No. 85-1953

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Whether Kansas statutes (Kan. Stat. Ann. §§ 66-1,184, 66-1,185) and administrative orders, as well as Sections 202 and 210 of the federal Public Utility Regulatory Policies Act of 1978 ("PURPA") and regulations thereunder, violate either the Taking Clause or the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution—by taking property without just compensation or for private use or by depriving a utility of liberty or property without due process of law—in requiring an electrical utility:

1. Without compensation therefor—to allow a private party (i) physically to enter and use the utility's power line easements or realty, (ii) to make physical connection with the utility's poles, wires and electrical facilities, and (iii) to make physical injections of electrical power into the utility's transmission and distribution system;
2. To make monetary payments (property) to such private party (a "cogenerator") for unreliable electrical power, which is not needed by, not wanted by, and of no value to the utility;
3. Without compensation therefor—to forego the utility's own use of its ample generating capacity and of its transmission and distribution system;
4. To be subjected to any one or more of such requirements without provision in such statutes, orders or regulations for a judicial determination of just compensation;[1] or

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1. This question also is presented in *FCC v. Florida Power Corp., appeal docketed,* No. 85-1658 (U.S. Apr. 9, 1986) and in *Group W Cable, Inc. v. Florida Power Corp., appeal docketed,* No. 85-1660 (U.S. Apr. 9, 1986).

5. To accept an administrative, non-judicial determination of what "compensation" the utility shall receive for the money (property) it is compelled to pay the private party as mentioned above[2] and otherwise to be subjected to each of the remaining requirements above mentioned without provision for either an administrative or a judicial determination of just compensation.

II. Whether the statutes, administrative orders, and regulations mentioned in I above deprive Appellant of liberty or property without due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution (i) by compelling the formation and performance of contracts against Appellant's will, (ii) by embracing means without a real and substantial relation to and in conflict with the statutory end of using fuels other than oil and gas to generate electricity in forcing Appellant to forego burning coal to generate power while allowing private cogenerators to burn oil and natural gas to create the power Appellant must buy, or (iii) by taking Appellant's property without just compensation or for private use.

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2. *Id.*

PARTIES BELOW

The parties to the proceeding below are as follows:

1. Kansas City Power & Light Company, *Applicant-Appellant.*

2. The State Corporation Commission of the State of Kansas, Michael Lennen, Chairman, Margalee Wright, and Keith R. Henley, Commissioners, and their respective successors in office as the constituent members of the State Corporation Commission of the State of Kansas, *Respondents-Appellees.*

3. American Paper Institute, Inc., *Intervenor-Appellee.*

4. Martin Tractor Company, Inc., *Amicus Curiae.*

Appellant Kansas City Power & Light Company has no parent companies or affiliates. Apart from wholly owned subsidiaries, its only subsidiary is Utility Fuel Company.

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No. 85-

In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

Appellant Kansas City Power & Light Company ("KCPL") appeals from a final judgment of the Supreme Court of Kansas.

OPINIONS BELOW

The opinion of the Kansas Supreme Court (App. A1-A19)[3] is reported at 238 Kan. 842, 715 P.2d 19 (1986). The orders of the State Corporation Commission of the State of Kansas ("Appellee Commission") in the predecessor case (App. A20-A59) and in the instant case (App. A75-A81) are unreported, as are the opinions of the Linn County District Court in the predecessor case (App. A60-A64) and the present case (App. A82-A86). The opinion of the Kansas Supreme Court in the predecessor case (App. A65-A74) is reported at 234 Kan. 1052, 676 P.2d 764 (1984).

3. Citations to "App." refer to the separate appendix that accompanies this jurisdictional statement, pursuant to Rule 15.1(j) of this Court.

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on February 21, 1986. Appellant filed a timely notice of appeal in the Kansas Supreme Court on March 28, 1986 (App. A87-A89). The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U.S.C. § 1257(2).[4]

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following constitutional provisions, statutes, and regulations involved are set forth in the appendix accompanying this statement: the Taking Clause of the Fifth Amendment to the United States Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments thereto (App. A90); Title 16, Sections 796, 824a-3, 824i, 824k, and 2601 of the United States Code (1982) (codifying Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§ 201, 210, 202, 204(a), 2, 92 Stat. 3117 (1978))

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4. The issues concerning the constitutionality of the Kansas statutes and orders were raised by application and brief before the Kansas Corporation Commission and by brief and argument in the Linn County District Court and the Kansas Supreme Court; the Commission and both courts rejected Appellant's Taking Clause and Due Process Clause claims and upheld the constitutionality of the Kansas statutes and regulations as applied in this case. Hence, an appeal lies pursuant to 28 U.S.C. § 1257(2) (1982).

The questions involving the constitutionality of federal statutes and regulations may be considered on this appeal because once this Court has "appellate jurisdiction, [it] also take[s] jurisdiction over any aspects of the case which would otherwise fall solely within [its] certiorari jurisdiction." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 n.14 (1975). If this Court should conclude that this entire case does not fall within its appellate jurisdiction, KCPL requests that this statement be treated as a petition for a writ of certiorari, in which case jurisdiction is invoked under 28 U.S.C. § 1257(3) (1982). *See* 28 U.S.C. § 2103 (1982).

(App. (A90-A111); Title 18, Part 292 of the Code of Federal Regulations (1985) (App. A114-A144); Sections 66-1,184 and 66-1,185 of the Kansas Statutes Annotated (1985) (App. A111-A113); and administrative orders of the Appellee Commission (App. A20-A59, A75-A81).

STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of Sections 210 and 202 of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. §§ 824a-3, 824i (1982)), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

STATEMENT OF THE CASE

A. Overview.

The Appellant is an investor-owned electric utility which functions in the traditional way of selling its own electric power to the public in its certificated sales territory. Appellant has never held itself out to the public as willing to buy power from the public and has never held itself out to the public as willing to provide transmission and distribution service to the public. Appellant is not a common carrier. (App. A164, A158). The Appellee Commission is the state agency which regulates the Appellant within the scope of its holding out.

This appeal concerns interrelated Kansas and federal statutes and regulations (hereinafter sometimes referred to

as the "Scheme")[5] which force Appellant and other electric utilities to purchase electrical power from certain private parties ("cogenerators")[6] and which further require utilities, without compensation, to allow such private parties (i) to enter their property, (ii) to make physical connections with the utilities' poles, wires, and electrical facilities and (iii) to inject such power into the utilities' systems. Further, in the absence of an agreement between a utility and a cogenerator concerning the amount of money required to be paid by the utility for cogenerated power, such amount is, under both the state and federal provisions, to be determined by the state regulatory agency. No provision is made to compensate the utilities for their loss of (i) the right to exclude cogenerators from physical access to utility properties, (ii) the right to prevent cogenerators from making physical connections with utility power lines, poles, and facilities, and (iii) the right to prevent cogenerators from physically injecting power into

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5. The Scheme consists of 1979 Kan. Sess. Laws ch. 170, § 1 (codified at Kan. Stat. Ann. § 66-1,185), 1979 Kan. Sess. Laws ch. 208, § 1 (codified at Kan. Stat. Ann. § 66-1,184), State Corporation Commission of the State of Kansas, Docket No. 115,379-U, orders dated October 15, 1984 (modifying and repromulgating the cogeneration orders in the predecessor case), and November 2, 1984 (denying Appellant's application for rehearing), Public Utility Regulatory Policies Act of 1978, §§ 210, 202 (codified as amended at 16 U.S.C. §§ 824a-3, 824i), and 13 C.F.R. §§ 292.101-.602 (1985). Citations to the appendix hereto for each part of the Scheme are included at pages 2-3 hereof under the heading "CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED".

6. Except where the context clearly indicates otherwise, the terms "cogenerator" and "cogenerators" are used in this Jurisdictional Statement to include qualifying cogeneration facilities and qualifying "small power production" facilities within the meaning of PURPA as well as persons with whom utilities are purportedly obligated to "contract" for "parallel generation services" under Kan. Stat. Ann. § 66-1,184. These terms are further explained at pages 8-10, 6-8 hereof. Under the Scheme, a cogenerator does not have to be a customer of the utility (App. A145, A146).

the utility transmission and distribution systems. In addition, no provision is made to compensate the utilities for the further significant aspect of having to forego their own use of their generating plants and of their transmission and distribution systems—created by substantial investment—so as to absorb the cogenerated power.

The Appellee Commission found that the energy production capacity of the Appellant and other electric utilities in Kansas was surplus to market demand needs for the foreseeable future (App. A33) and thus the cogenerator's power forced upon the Appellant is not wanted, not needed, and of no value to the Appellant. Thus, the cogenerated power is not just compensation for the money taken. Quite independently of the foregoing decisive factors, the Appellee Commission even contended below that, as to cogenerated power being sent into Appellant's system, the Appellant's generating plants could not back down or reduce generation (Appellee's Brief in Kansas Supreme Court at 22; Appellant's Reply Brief in Kansas Supreme Court at 7-8); and thus, even on the Appellee Commission's own theory below, the cogenerated power does not constitute "just compensation" for the money taken from the Appellant and paid to cogenerators, because the Appellant has to generate the same quantity of power with its own generators anyway—and so pay for it twice—and thus receives no benefit.

Further, the statutes, orders and regulations do not provide for any judicial determination of just compensation for any of the takings or deprivations of property rights of the Appellant and other utilities. The only provision made is for an administrative determination of "compensation" for only one item of property taken, namely the money the utility is forced to pay, and the utility is re-

quired to abide by this administrative, nonjudicial determination.[7] As noted, there is no provision for either an administrative or a judicial determination of compensation for any of the remaining property rights lost by or taken from the Appellant and other utilities.

More precisely, the Kansas statutes above mentioned, the Appellee Commission's order of October 15, 1984, PURPA sections 210 and 202, and the FERC regulations promulgated thereunder are interrelated acts of the legislative and executive branches of the state and federal governments, compelling Appellant to allow, or make, physical interconnections of its system with cogenerators, to purchase power from cogenerators, and to submit to certain exactions against its will. Under the full reach of the Scheme, a cogenerator does not have to be an existing or future customer of the utility to force purchases by the utility (App. A145, A146). This Scheme has or authorizes several effects on Appellant and other utilities.

First, the Scheme compels Appellant to pay its money to cogenerators for electricity that Appellant does not want or need and that it cannot rely on receiving at any particular moment. (App. A164, A150). Appellee Commission found that Appellant's energy production capacity was surplus to its market demand needs for the foreseeable future (App. A33, A77). Cogenerators are private persons and are precluded by the Scheme from being designated and regulated as public utilities. 16 U.S.C. § 824a-3(e) (1982). After this money passes to the cogenerators, it becomes their property—no longer that of Appellant, and not that of the public. *Id.* The power is not reliable, is not firm "on peak," is valueless, and is not just compensation for the money taken.

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7. See footnote 1.

Second, the Scheme compels Appellant to permit cogenerators to make physical connections with and to have physical access to Appellant's transmission and distribution system. To comply with the Scheme, Appellant must allow cogenerators to connect their facilities to its own. But for the Scheme, Appellant would be able to deny them these connections with and this access to its property. Kan. Stat. Ann. §§ 66-1602(a), 66-1601(b), 66-1605, 66-1603 (1985). The Scheme does not provide Appellant compensation for this loss of its ability to exclude cogenerators from its property and facilities. Cogenerators, pursuant to 16 U.S.C. § 824a-3(e) (1982), are protected from designation as public utilities and remain private persons engaged in business for profit.

Third, the Scheme requires Appellant to permit cogenerators to make use of its transmission and distribution system and to send electricity physically into its system. But for the Scheme, Appellant, under the Kansas statutes cited in the preceding paragraph, could deny them this particular use of its property. Because the power lines have a finite capacity, Appellant is denied the full use of its property to the extent that electricity from the cogenerators uses such capacity (App. A164, A151). Appellant does not receive compensation under the Scheme for this loss of its ability to exclude these other private persons from its property or for this use of its transmission and distribution facilities.

Fourth, the Scheme requires Appellant to permit agents of the cogenerators to enter upon its real property. The Linn County District Court found:

> [Utilities] would be required to allow other individuals to come upon their property, that is[,] easements, for the purpose of making connections with their lines

for the sale to KCP&L of excess power generated by them.

(Memorandum Decision, May 31, 1985) (App. A85). Though Section 66-1,184 provides that cogenerators may be required to reimburse the utility for some, but not all, of the physical interconnection costs (e.g., not for load research metering costs), the statute makes no provision for reimbursement for the real property rights taken in effecting these mandated physical interconnections and occupations.

Fifth, the Scheme requires Appellant to forego in part the use of its own generating facilities. Appellee Commission has already found that Appellant's energy generating ability is ample. (App. A33 [April 28, 1982, finding that "Kansas electric utilities have surplus capacity at this time and for the indefinite future"], App. A77 [incorporating this finding into its October 15, 1984, order].) Appellant burns coal to produce 96.1% of its electricity. (App. A164, A161). Cogenerators (in the strict sense of the term) may use oil or natural gas to produce all of their electricity, 18 C.F.R. § 292.205 (1985), and "small power producers" may use oil and natural gas for up to 25 percent of their annual total energy input. *Id.* § 292.204 (b)(2). PURPA was intended to reduce consumption of oil and natural gas in generating electric energy. S. Rep. No. 95-442, 95th Cong., 2d Sess. 9 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7903, 7906; H.R. Rep. No. 95-543, 95th Cong., 2d Sess. 22 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7673, 7691.

B. Statutory and Regulatory Background.

1. The Public Utility Regulatory Policies Act. The Public Utility Regulatory Policies Act of 1978

("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (1978), was enacted by Congress in response to the "energy crisis" perceived to exist at the time. Section 210 of PURPA, codified as amended at 16 U.S.C. § 824a-3 (1982), deals with cogeneration and small power production. PURPA defines "cogeneration facility" as one that produces (a) electric energy and (b) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes. PURPA § 201, 16 U.S.C. § 796(18)(A) (1982). It defines "small power production facility" as one that "produces electric energy solely by the use, as a primary source, of biomass, waste, [or] renewable resources." PURPA § 201, 16 U.S.C. § 796(17)(A) (1982). It defines "qualifying" cogeneration and small power production facilities as those which the Federal Energy Regulatory Commission (hereinafter "FERC") determines to have met FERC requirements regarding factors such as fuel use and fuel efficiency, and which are not owned by regular electric utility companies. 16 U.S.C. § 796(17)(C), (18)(B) (1982). Subsection (e) of Section 210 provides that cogenerators shall not be treated as public utilities within the meaning of federal and state regulatory statutes.

Subsection (a) of Section 210 requires FERC to prescribe such rules as it determines necessary to encourage cogeneration, including "rules requir[ing] electric utilities to offer to . . . purchase" electricity from cogenerators. Subsection (b) provides that the FERC regulations shall require that certain rate-making concepts are followed in setting rates for purchases of electricity by utilities from cogenerators. Subsection (f) requires state regulatory authorities to implement these FERC regulations with respect to electric utilities falling within their respective jurisdictions.

PURPA Section 202 authorizes FERC to order utilities to permit cogenerators to make physical interconnections with their systems. It may also order utilities to increase their transmission capacity on their easements to accommodate such interconnection and use. 16 U.S.C. § 824i (1982). PURPA and this section do not provide for compensation to be paid for any taking of real property effected under color of such orders in making such physical interconnections.

2. FERC Regulations.

On February 20, 1980, FERC promulgated rules, 45 Fed. Reg. 12,233 (1980) (codified at 18 C.F.R. §§ 292.101-.602 (1985) (App. A114-A144)), as required by Section 210 of the statute. Subsection (a) of regulation Section 292.303 mandates that "[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a [cogenerator]" at rates to be set by the state regulatory agency.

Regulation subsection (c) mandates physical interconnections, requiring that "any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases" as required by subsection (a). In pertinent part, subsection (c) provides:

> (c) *Obligation to interconnect.* . . . any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

Any reimbursement to the utility for the cost of physically constructing the interconnection would be only as might be prescribed by the state regulatory agency, and that not

necessarily at the time the costs are incurred, but possibly over a "reasonable" period of time. 18 C.F.R. § 292.306 (1985). The FERC regulations do not provide for any compensation for any takings of real property effected under color of orders promulgated pursuant to these regulations.

Regulation Section 292.401 provides that the state regulatory agencies shall implement the interconnection and purchase requirements set forth in the regulations previously cited.

3. The Kansas Statutes.

In its first session after the enactment of PURPA, the Kansas Legislature adopted a statute—styled the Natural Gas Policy Act—providing that Appellee Commission would have the jurisdiction necessary to enable it to carry out and comply with the terms of PURPA and the FERC rules and regulations thereunder (e.g., including interconnection requirements and transmission capacity increase requirements). 1979 Kan. Sess. Laws ch. 170, § 1 (codified at Kan. Stat. Ann. § 66-1,185 (1985) (App. A113)).

Later in the same session, the Legislature adopted the Parallel Generation Services Act, which independently mandates physical interconnections with Appellant's system and in part provides:

> Every public utility which provides retail electric services in this state shall enter into a contract for parallel generation service with any person who is a customer of such utility, upon request of such customer, whereby such customer may attach or connect to the utility's delivery and metering system an apparatus or device for the purpose of feeding excess

> electrical power which is generated by such customer's energy producing system into the utility's system.

1979 Kan. Sess. Laws ch. 208, § 1 (codified at Kan. Stat. Ann. § 66-1,184 (1985) (App. A111-A113)).[8] Although the statute states that the cogenerator "may" be required to reimburse the utility for some of the cost of physically interconnecting the facilities, neither of the two Kansas statutes cited makes provision for compensating the utility for the takings of real property and property rights effected under color of these statutes.

4. The Kansas Corporation Commission's Initial Orders.

Appellee Commission issued an order dated April 28, 1982 (App. A20-A38), (i) requiring utilities to file tariffs for purchases from cogenerators whose facilities have a design capacity of less than 100 kilowatts, establishing a formula for rates utilities must pay such cogenerators, and mandating such purchases, and (ii) requiring electric utilities to enter into electricity purchase contracts with cogenerators whose facilities have a design capacity of more than 100 kilowatts. The costs of making the physical interconnection—*i.e.*, labor and equipment—were, to the extent deemed reasonable by the Appellee Commission, to be paid by the cogenerator. On November 5, 1982, Appellee Commission issued an order on rehearing (App. A45), affirming the April 28 order in all material aspects.

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8. As the Appellee Commission acknowledges, Section 1,184—dealing with only one of three types of "cogenerators"—does not express the full reach of the Scheme, which does not require every cogenerator to be a customer of the utility in order to force connections with and purchases by the utility (App. A145, A146).

5. The Predecessor Case.

After the Appellee Commission's orders had become final, Appellant sought judicial review of these orders, and ultimately in *Kansas City Power & Light Co. v. State Corporation Commission,* 234 Kan. 1052, 676 P.2d 764 (1984) (App. A65-A74), the Kansas Supreme Court vacated the Appellee Commission's orders, upon the ground that the rate at which they would have required utilities to pay cogenerators was in excess of that federally allowed. The Court did not decide the constitutional objections raised in Appellant's first appeal and now again here raised.

6. The Kansas Corporation Commission's Final Order.

In an October 15, 1984 order (App. A75-A78), Appellee Commission repromulgated some of the requirements contained in its initial orders vacated by the Kansas Supreme Court, with modifications designed to avoid in the new order the statutory illegality that the Court had found in the rate the utilities had been required to pay cogenerators. Because the modifications the Appellee Commission had thereby made in its initial orders were not responsive to KCPL's constitutional objections, KCPL continued to press these objections. On October 23, 1984, Appellant moved for rehearing by Appellee Commission (App. A148) and on November 2, 1984, the application was denied (App. A79-A81).

7. This Litigation.

After the Commission's October 15, 1984 order became final, Appellant sought judicial review of the order in the Linn County District Court. On May 31, 1985,

the court held that the order was valid (App. A82-A86), and this determination was affirmed by the Kansas Supreme Court on February 21, 1986 (App. A1-A19). This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

A. Overview.

The Court should note probable jurisdiction of this appeal, (i) because the constitutional questions here presented under the Taking Clause of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment have not been decided by this Court either as to PURPA or any state statute or regulation implementing PURPA and so are novel, (ii) because the existing Supreme Court decisions as to similar regulatory schemes, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-37 & n.13 (1982); *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55 (1937), and other key precedents, *Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985), *appeal docketed*, Nos. 85-1658, 85-1660 (U.S. Apr. 9, 1986); *Beattie v. Shelter Properties, IV*, 457 So. 2d 1110, 1113 [3] (Fla. Dist. Ct. App. 1984); *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates Ltd.*, 451 So. 2d 1034, 1036, 1035 n.1 (Fla. Dist. Ct. App. 1984), demonstrate substantial merit in Appellant's constitutional positions and conflict with and error in the decision of the Court below, (iii) because one of the major issues in *Florida Power, supra,* now docketed in this Court, under the similar 1978 Pole Attachments Act—namely the Eleventh Circuit's decision that the statute and regulations violate the Fifth Amendment Taking Clause by failing to allow for a judicial determination of what constitutes just compensation

—is a key constitutional issue raised herein by this Appellant, (iv) because this Court may thus avail itself of the opportunity to render a comprehensive and clear decision putting to rest novel constitutional issues involving the cable television industry under the 1978 Pole Attachments Act of Congress and an incipient cogeneration industry under PURPA and state statutes and regulations purportedly seeking to implement PURPA, (v) because the constitutional questions under the Fifth and Fourteenth Amendments to the United States Constitution as to the deprivation of a utility's freedom not to contract, outside the scope of its holding out, have never been decided by this Court under PURPA or any of the state statutes or regulations purportedly implementing PURPA, (vi) because the issue of the constitutional validity of forcing this Appellant, which burns coal to produce over 96% of its electricity, to back down upon such coal-fired generation to make mandated purchases of power from cogenerators authorized to burn oil and gas, thus applying to the Appellant means in conflict with and having no rational relation to the statutory end of decreasing the use of oil and gas for the generation of electric power, has never been decided by this Court, and (vii) because, in view of the invasions of liberty and property now nationally underway under color of PURPA, this Court properly needs to decide whether the following words of Justice Holmes are still alive:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

B. The Statute and Regulations Upheld Below Effect Takings of Appellant's Property Without Just Compensation and for Private Use and Without a Judicial Determination of Compensation, in Violation of Amendment V of the United States Constitution, As Applied to the States by Amendment XIV of the Constitution.

First, the statutory and regulatory Scheme under consideration here calls for the taking of interests in real property without compensation therefor and for the transfer of these interests to private persons. The electric utility is required to allow a private party, the cogenerator, (i) physically to enter to use its power line easements or realty, (ii) to make physical connection with its poles, wires and electrical facilities, and (iii) to make physical intrusions of electrical power into its transmission and distribution system. Indeed, the District Court here expressly ruled:

> It is true that they would be required to allow other individuals to come upon their property, that is easements, for the purpose of making connections of their lines for the sale to KCP&L of excess power generated by them.

(App. A85). Absent the Scheme, Appellant would be able to deny cogenerators these connections with and this access to its property. Kan. Stat. Ann. §§ 66-1602(a), 66-1601(b), 66-1605, 66-1603 (1985). No compensation to the utility is provided in the Scheme for the taking and loss of such rights of permanent physical access to its

property and its electrical facilities.[9] Again, these prosions run afoul of the guarantees set forth in the Fifth Amendment and applied to the states by the Fourteenth Amendment. This Court recently reaffirmed the rule that such a permanent physical occupation authorized by government is a taking, without regard to the public interest it may serve, without regard to the amount of space occupied, and without regard to any minimal economic impact on the owner. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-37 & n.13 (1982). In short, Justice Marshall in *Loretto* wrote for this Court:

> We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

Id. at 426.[10] Relying in part upon *Kaiser Aetna v. United*

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9. The provision of the Scheme calling for the cogenerator to pay some of the mere costs of creating the physical interconnections has been held in similar cases not to be compensation for the taking (from the owner's perspective) of the property right to exclude or to be free of such connection or (from the private cogenerator's perspective) of the right of physical interconnection and the right of such physical access. *Beattie*, 457 So. 2d at 1113 [3]; *Storer*, 451 So. 2d at 1036, 1035 & n.1. Thus the state statutes and regulations implementing Section 202 of PURPA, though providing that cogenerators pay some of the cost of labor and equipment required for such physical interconnections, do not satisfy the just compensation requirement of the Fifth Amendment.

10. Justice Marshall explained that the word "permanent" in the rule only meant that the party desiring to make or maintain the physical intrusion could do so as long as such party desired so to do, whether or not the owner consented. *Id.* at 439 & n.17. Such is true of cogenerators. See also *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1543, 1544 (11th Cir. 1985), *appeal docketed*, Nos. 85-1658, 85-1660 (U.S. Apr. 9, 1986).

States, 444 U.S. 164, 176, 179-80 (1979), Justice Marshall emphasized that an order's right to exclude was "one of the most essential sticks in the bundle of rights commonly characterized as property." 458 U.S. at 433. As a result, just compensation to the owner is required. U.S. Const. amend. V. Since no constitutional compensation is provided here, and since each of the takings is for private use, the cogeneration statutes and regulations are invalid as authorizing unconstitutional takings in violation of the Taking Clause.

Second, this statutory and regulatory Scheme forces Appellant to pay money (property) to private persons while receiving nothing of value in return. These payments, while nominally to be made in exchange for electrical power which Appellant is required to purchase, in fact yield Appellant power which it does not want or need and that it cannot rely on receiving at any particular moment (App. A164, A150). Because the Appellee Commission has already found that the energy production capacity of Appellant and the other electric utilities in Kansas exceeds market demand for the foreseeable future, any additional power from cogenerators provides absolutely no benefit to Appellant. Yet, the statutes and regulations being challenged in this case force Appellant to make the required payments to cogenerators irrespective of whether any benefit is received in return.[11] When presented with a similar regulatory scheme in the case of *Thompson v.*

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11. The Appellee Commission even contended below (Appellee Commission's Brief in Kansas Supreme Court at 22; Appellant's Reply Brief in Kansas Supreme Court at 7-8) that Appellant could not back down or reduce its level of generation by using the amounts of cogeneration energy being supplied, so, on the Appellee Commission's theory, the Appellant pays twice for the energy; and the cogenerated energy is thus not "just compensation."

Consolidated Gas Utilities Corp., 300 U.S. 55 (1937), this Court struck it down as a violation of the Taking Clause. *Id.* at 78-79. Justice Brandeis, writing for a unanimous Court, held:

> The pipeline owner, a private person, is, *in effect,* ordered to pay *money* to another private well owner *for the purchase* of oil *which there is no wish to buy* . . .
>
> The Order disables the plaintiffs from performing their contracts except by means of purchases. Resort to those means necessarily results in depriving the plaintiffs of property. Under each statute, if obeyed, *the State takes from the pipeline owner the money with which the purchase is made,* the money lost through curtailed use of properties developed at large expense, money lost because of the drainage away from his land of the gas which he is forbidden to produce for himself, but must buy from those towards whose land it migrates.
>
> *Our law reports no more glaring instance of the taking of one man's property and giving it to another.*

Id. at 78-79 (emphasis supplied). It may be noted that in this very similar scheme the money taken was to be exchanged for oil and gas, just as the money taken here is to be exchanged for power. The scheme in *Thompson* was held invalid as a taking both for private use as well as without providing just compensation. *Id.* at 78. Just as the plaintiff in *Thompson* was not a common carrier of gas and oil or a utility holding itself out to purchase gas and oil from the public, so KCPL is not a common carrier as to power or a utility holding itself out to purchase power from the public. The regulatory Scheme at issue

here thus suffers from the same constitutional infirmities as the scheme struck down in *Thompson.*

A third aspect of the Scheme here at issue violates Appellant's rights under the Fifth and Fourteenth Amendments. Not only do the statutes and regulations call for the taking of Appellant's property (money), but they would have an administrative agency—Appellee Commission—determine the compensation to be received for this taking. Such a procedure is constitutionally impermissible; as the Eleventh Circuit Court of Appeals recently noted in striking down a similar statute, "the determination of what constitutes just compensation is a decision which has been jealously guarded as being solely within the parameters of the judicial function." *Florida Power Corp. v. FCC,* 772 F.2d 1537, 1544-45 (11th Cir. 1985), *appeal docketed,* Nos. 85-1658, 85-1660 (U.S. Apr. 9, 1986). The Fifth Amendment—made applicable to the States by the Fourteenth Amendment—requires that this question be determined and resolved in a court of law, not in an administrative agency. The Scheme is thus invalid.

Fourth, the rule of or standard for determining what constitutes "just compensation" is likewise a question that is reserved for the judiciary; as the United States Court of Claims recently reaffirmed, "It does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation." *Miller v. United States,* 620 F.2d 812, 837 (Ct. Cl. 1980). PURPA's legislative prescription for compensation in 16 U.S.C. § 824a-3(b) (1982)—refined by labyrinthine FERC regulations, 18 C.F.R. § 292.304 (1985), and implemented by Appellee Commission under color of state law, Kan. Stat. Ann. §§ 66-1,184, 66-1,185 (1985)—unconstitutionally in-

vades this exclusively judicial function.[12] The Scheme thus fails to satisfy the requirements of the Taking Clause.

Because the statutes and regulations here at issue require Appellant to make monetary payments to private parties for a product which has no value to Appellant, because the compensation to be received by Appellant for this taking is determined in administrative, rather than judicial, proceedings under nonjudicial standards, and because appellant is required, without compensation, to allow private parties to have permanent physical access to its easements and facilities and to forego use of its ample generating facilities and transmission and distribution systems, the Scheme violates Appellant's rights under the Taking Clause and should be invalidated.

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12. For example, substantively, no provision is made for compensation for any real property interests taken or for cogenerated power to be paid for at "fair market value" (or at any other constitutionally acceptable measure). In short, the Scheme requires payment of avoided cost, though constitutional compensation may be less, if the state regulatory body does not determine such lesser value is sufficient to encourage cogeneration and small power production. The orders entered by Appellee Commission adopt an avoided cost and not the fair market value measure of compensation. (App. A27-A34, A38, A76-A78). This Court has ruled that the "just compensation" required by the Fifth Amendment "means in most cases the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 10 (1984).

C. The Statutes and Regulations Upheld Below Deprive Appellant of Its Freedom of Contract by Imposing Contracts on Unwilling Parties and Dictating the Terms of Those Contracts, and, As Applied to Appellant, They Lack a Rational Relation Between Their Stated Ends and the Means Adopted to Achieve Those Ends, in Violation of the Due Process Clauses of Amendments V and XIV to the United States Constitution.

The cogeneration statutes and regulations further violate Appellant's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments. Because the cogeneration Scheme would impose a contract on an unwilling party, dictate the terms of the contract, and require its performance, and because the Scheme is not reasonably calculated to further the ends articulated in PURPA's legislative history, it fails to comport with due process and should be struck down.

This Court has held that freedom of contract is an aspect of the "liberty" protected under the Due Process Clause. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 572 (1972). The freedom to contract perforce includes the freedom *not* to contract. *See, e.g., Shaitelman v. Phoenix Mut. Life Ins. Co.,* 517 F. Supp. 21, 25 (S.D. N.Y. 1980). While government may impose reasonable restrictions on contracts once they are freely negotiated and existing, *Highland v. Russell Car & Snowplow Co.,* 279 U.S. 253, 261 (1929), it is a far different matter for government affirmatively to impose a contract upon and to make an entire contract for an involuntary party. The statutes and regulations under consideration here would do precisely this. Not only do they infringe upon Ap-

pellant's right to exercise its own discretion as to the parties with whom it does business, *see Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980), but they go much further: they create each and every feature of a contract and then require its performance.[13] Such a Scheme violates Appellant's due process rights.

The cogeneration Scheme further lacks any reasonable relation to its ostensible legislative ends; in fact, the means it adopts are contrary to the ends identified in PURPA's legislative history. The bill was designed to decrease the nation's use of oil and natural gas for the generation of electric power, S. Rep. No. 95-442, 95th Cong., 2d Sess. 9 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7903, 7906, to the end of "sav[ing] a significant amount of scarce natural gas and reduc[ing] importation of petroleum by 1985 and in future years." H.R. Rep. No. 95-543, 95th Cong., 2d Sess. 22 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7673, 7691. Appellant, however, uses coal to produce over 96% of its electricity (App. A164, A161), while many cogenerators produce their power by burning oil and natural gas. As applied to Appellant, the statutes and regulations here under review therefore act to encourage the burning of oil and natural gas to generate electricity—precisely contrary to the stated goal of the PURPA legislation. The Scheme thus lacks any real and substantial relation between the means it imposes and the objectives asserted to justify them, and it therefore fails to satisfy due process.

Because the statutory and regulatory Scheme under consideration here deprives Appellant of its freedom of contract—a liberty interest protected under the Fifth and

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13. As shown in Point B, the performance of the "contract" violates the Taking Clause.

Fourteenth Amendments—and because the Scheme lacks a reasonable relation between its stated ends and the means adopted, it fails to comport with due process and should be struck down.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set this case for plenary review.

Respectfully submitted,

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May 22, 1986

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In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

SUPREME COURT OF KANSAS

No. 58,293

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Michael Lennen, Chairman, Margalee Wright and Keith R. Henley, Commissioners, and their respective successors in office as the constituent members of the State Corporation Commission of the State of Kansas,
Appellees.

SYLLABUS BY THE COURT

1. It is held that, under the facts of this case, the provisions of the federal Public Utility Regulatory Policies Act of 1978 (PURPA, codified as amended at 16 U.S.C. §§ 824a-3, 824i [1982]), Federal Energy Regulatory Commission (FERC) regulations implementing PURPA (18 C.F.R. §§ 292.101-.602 [1985]), K.S.A. 66-1,184, and K.S.A. 66-1,185 are not in violation of the taking clause, the contracts clause or the due process clause of the Fifth Amendment to the United States Constitution.

2. Rules of constitutional law are reviewed.

Appeal from Linn district court; LEIGHTON ARCHER FOSSEY, judge. Opinion filed February 21, 1986. Affirmed.

Lowell L. Smithson, of Spencer, Fane, Britt and Browne, of Kansas City, Missouri, argued the cause and *Charles S. Schnider,* of the same firm, of Overland Park,

John W. Simon, of the same firm, of Kansas City, Missouri, *Warren B. Wood,* of Kansas City Power and Light Company, of Overland Park, and *Richard M. Smith,* of Smith and Winter-Smith, of Mound City, were with him on the brief for appellant.

Brian J. Moline, general counsel, State Corporation Commission, argued the cause and *Robert M. Fillmore, Eva Powers,* and *Mary Ann Neath,* all of the State Corporation Commission, were with him on the brief for appellees.

Warren E. Baker, of Prairie Village, was on the brief for intervenor-appellee American Paper Institute, Inc.

Thomas W. Porter, of Erickson and Hall, of Topeka, was on the brief for *amicus curiae* Martin Tractor Company. The opinion of the court was delivered by

LOCKETT, J.: Kansas City Power & Light Company (KCP&L) appeals from a decision of the District Court of Linn County, Kansas, upholding an order of the State Corporation Commission (KCC) which requires an electric utility to enter into a contract to purchase electricity from a cogenerator or small power producer. The KCC order was in implementation of § 202 and § 210 of the federal Public Utility Regulatory Policies Act of 1978 (PURPA, codified as amended at 16 U.S.C. §§ 824a-3, 824i [1982]), Federal Energy Regulatory Commission (FERC) regulations implementing PURPA (18 C.F.R. §§ 292.101-.602 [1985]), K.S.A. 66-1,184, and K.S.A. 66-1,185.

A statement of the facts involved in this case is set forth in *Kansas City Power & Light Co. v. Kansas Corporation Comm'n,* 234 Kan. 1052, 676 P.2d 764 (1984). The facts surrounding the federal statute are set forth in *FERC v. Mississippi,* 456 U.S. 742, 72 L.Ed.2d 532, 102 S.Ct. 2126 (1982).

In 1978, the Congress of the United States enacted the Public Utility Regulatory Policies Act of 1978 (Pub. L. No. 95-617). Congress acted in concern for the energy crisis and the rapid increases in the cost of electricity. Section 210 of the act directed the Federal Energy Regulatory Commission to promulgate rules to encourage cogeneration. FERC enacted a rule requiring utilities to purchase electric energy from qualifying cogenerators and small power production facilities (cogenerators) at a rate equal to the utility's "full avoided cost." FERC also required utilities to make such physical interconnection with cogenerators as necessary to effect purchases of sales of electricity authorized by PURPA. In 1979, the Kansas legislature responded to PURPA by enacting K.S.A. 66-1,185, which gave the KCC such jurisdiction as was required to comply with and carry out the requirements of PURPA and the rules and regulations adopted by FERC. To carry out the legislature's mandate, the KCC adopted rules and regulations.

In *Kansas City Power & Light Co. v. Kansas Corporation Comm'n,* 234 Kan. 1052, this court determined that the orders of the KCC which required an electric utility to purchase electricity from a cogenerator at a rate greater than the federally regulated rate (avoided cost to the utility) were unlawful, unless the KCC first obtained a waiver from FERC. That determination made it unnecessary for this court to discuss the constitutional issues raised by KCP&L at that time. On this appeal, KCP&L raises the constitutional issues.

In *FERC v. Mississippi,* 456 U.S. 742, the United States Supreme Court held that Congress, acting under its police powers for the protection of the public health, safety, and welfare and the preservation of national security, exer-

cised congressional authority under the commerce clause of the Constitution to enact PURPA to encourage development of cogenerators. The Supreme Court determined that the Congress had authority to act under the commerce clause of the Constitution, and it did not entrench upon state sovereignty in violation of the Tenth Amendment. The Court did not consider whether the act violated any other sections of or amendments to the Constitution.

In *American Paper Inst. v. American Elec. Power,* 461 U.S. 402, 76 L.Ed.2d 22, 103 S.Ct. 1921 (1983), the Supreme Court determined that FERC did not act arbitrarily or capriciously in promulgating certain regulations as to the cost of purchasing electricity from cogenerators and that requiring public utilities to make interconnections with cogenerators was necessary to consummate purchases and sales authorized by PURPA. No purchase or sale of power required by PURPA could be completed without an interconnection between the buyer and the seller.

Both American Paper Institute, Inc., an interventor-appellee, and Martin Tractor Company, Inc., *amicus curiae,* contend that the United States Supreme Court determined that PURPA was constitutional in *FERC v. Mississippi,* and that the regulations implementing the PURPA provisions were lawful in *American Paper Inst. v. American Elec. Power,* 461 U.S. 402, and, therefore, this court does not need to consider their constitutionality. They contend that United States Supreme Court decisions are precedent for issues of constitutional law even though the issue is not briefed or argued before the Court, and even though the Court's opinion contains no discussion of the issue. *Hicks v. Miranda,* 422 U.S. 332, 45 L.Ed.2d 223, 95 S. Ct. 2281 (1975). They argue that since the Court in *FERC v. Mississippi,* 456 U.S. 742, determined that the act did not violate the Tenth Amendment, that decision necessarily

indicates that the act does not violate any provisions of the Constitution. We do not agree. In *Hicks v. Miranda,* 422 U.S. 332, the United States Supreme Court was discussing that court's use of summary decision without a written opinion when affirming the judgment of a lower federal court. Here, the Court in a written opinion made a specific determination that the act did not violate the Tenth Amendment. Whether the act violated the Fifth or Fourteenth Amendments was not determined.

We are asked by KCP&L to declare that a federal statute violates the constitutions of both the United States and the State of Kansas. If a federal statute does not violate the Constitution of the United States, it cannot be held unconstitutional on the grounds that it violates a state constitution. Under the circumstances, whether PURPA violates our state constitution is beyond the jurisdiction of this state appellate court to determine. *McCulloch v. Maryland,* 17 U.S. 316, 4 L.Ed. 579 (1819). The only issue we need to determine is whether PURPA and the regulations promulgated by FERC violate the Fifth Amendment of the Constitution of the United States.

KCP&L raises these constitutional issues:

1. Whether the statutory scheme of PURPA unconstitutionally authorizes the taking of property without compensation and for the use of private persons in violation of the Fifth Amendment of the Constitution.

2. Whether the appellant's right to freedom of contract under the Fifth Amendment is violated by forcing the appellant to purchase electricity from third parties.

3. Whether the statutory scheme of PURPA violates the appellant's due process rights guaranteed by the Fifth Amendment.

KCP&L contends that PURPA contains several violations of the taking clause of the Fifth Amendment of the United States Constitution. The KCC contends that there are no violations of the taking clause.

The Fifth Amendment states:

> "nor shall private property be taken for public use, without just compensation."

The Supreme Court has stated that the Fifth Amendment clause providing that private property shall not be taken for public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978).

The question of what constitutes a "taking" of private property has proved to be a problem of considerable difficulty. There have not developed any rigid rules or set formula for determining when justice and fairness require that economic injuries caused by public actions be compensated. Whether there is a compensable "taking" under the Fifth Amendment depends largely upon the particular circumstances of each case. *Penn Central Transp. Co. v. New York City*, 438 U.S. at 124.

KCP&L contends that its Fifth Amendment right to just compensation for the taking of property has been violated by the statutory and regulatory scheme promulgated under PURPA. It contends that the statutory scheme has resulted in an unconstitutional taking in three primary areas: (1) it must pay cogenerators the avoided energy cost of energy received; (2) it must allow cogenerators to make physical connection with the KCP&L transmission

and distribution system at the site of a KCP&L easement; and (3) it requires KCP&L to idle or forego use of its generating capacity.

KCP&L contends that it is forced to pay its money, which is private property, to private parties, the cogenerators, and that this is a taking of private property for private use.

KCP&L cites *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 81 L.Ed. 510, 57 S.Ct. 364 (1937), as support for its argument. In that case, the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields was challenged. Under the orders to protect correlative rights of others in the natural gas pool, the production of natural gas was prorated by restricting the production of well owners, who had constructed pipelines that were necessary to fulfill their existing contracts, to an amount below their contract requirements. To fulfill the contracts, they were compelled to purchase gas from other well owners in the pool of gas, who were prohibited by law from producing because they had no market or pipelines. The court determined that the effect of such orders was to take from the owners, who had a market for their gas, a substantial and valuable interest in their private marketing contracts and the use of their pipelines and other facilities for transmitting their gas to market without just compensation. There was no taking for the public benefit nor payment of compensation provided. 300 U.S. at 77-79.

Thompson can be distinguished on the facts from the present case. The court made clear in *Thompson* that the pipelines were neither a common carrier of gas nor used in connection with the operation of any public utility. It said that it was beyond the power of the state by legis-

lative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation. *Michigan Commission v. Duke,* 266 U.S. 570, 577-578, 69 L.Ed. 445, 45 S.Ct. 191 (1925).

A utility company has the same rights under the taking clause as other private entities. The federal government may, however, under its police power, regulate a business affected with a public interest and, since the prime characteristic of a public utility is that of public use or service, it is clear that the federal government may regulate and control public utilities to protect the public interest and to promote the health, comfort, safety, and welfare of the people. *Great Northern Ry. v. Washington,* 300 U.S. 154, 81 L.Ed. 573, 57 S.Ct. 397 (1937).

While the regulations do require the utilities to pay private individuals for electricity supplied by the individuals, the public utilities are not of the same character as a private business, and have always been subject to governmental regulation. The purpose behind PURPA supports such an action. As Congress stated:

> "The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require . . . a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers." PURPA, 16 U.S.C. § 2601 (1982).

KCP&L claims that the taking clause is violated because no just compensation is received for the money

taken, as the power received is neither needed nor wanted. The KCC contends that KCP&L is justly compensated for the electricity it must buy.

On October 15, 1984, the KCC issued an order which established a purchase rate for cogenerated energy. The newly established purchase rate for cogenerated energy was based upon the energy cost, primarily fuel, avoided by KCP&L by reason of not generating the energy itself. KCP&L's cost of cogenerated energy is passed on to its ratepayers on a monthly basis through its energy cost adjustment tariff clause. The newly established purchase rate contains no avoided capacity cost (fixed plant cost) component. The electric service tariffs of KCP&L incorporate a return of and a return on KCP&L capacity costs. KCP&L is reimbursed dollar for dollar by ratepayers for all sums paid by KCP&L to cogenerators. In addition, KCP&L receives a profit because KCP&L rates for resale of cogenerated energy contain a return of and return on capacity cost which is not shared with cogenerators.

In a number of cases involving the condemnation of real property or an interest therein, the United States Supreme Court has recognized the principle that the function of compensation is to put the owner in as good a position pecuniarily as he would have occupied if his property had not been taken. *Olson v. United States,* 292 U.S. 246, 78 L.Ed. 1236, 54 S.Ct. 704 (1934); *Phelps v. United States,* 274 U.S. 341, 71 L.Ed. 1083, 47 S.Ct. 611 (1927). It has also applied the rule that where the property condemned has a market, the measure of the owner's indemnity is generally the market value of the property. *United States v. Virginia Electric Co.,* 365 U.S. 624, 5 L.Ed. 2d 838, 81 S.Ct. 784 (1961); *United States v. Twin City Power Co.,* 350 U.S. 222, 100 L.Ed. 240, 76 S.Ct. 259 (1956).

In the present case, KCP&L is receiving just compensation. It is allowed to charge its ratepayers its "avoided cost" paid to the cogenerators, plus a profit. This satisfies the Fifth Amendment requirement for just compensation.

KCP&L claims that the taking clause is violated because the statutes cause KCP&L, without any compensation therefor, to provide to the private cogenerator the right of permanent physical connection with and the right of permanent physical access to KCP&L's transmission and distribution network. The KCC contends that there is no taking because the energy transfers to KCP&L from cogenerating customers take place at the meter of the customer and not upon the real property of KCP&L.

KCP&L cites *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), in support for its argument. In *Loretto*, the State of New York enacted legislation to facilitate tenant access to cable television. The law required the installation of cable television facilities upon the landlord's property for his tenants (noncrossover) and a crossover right to supply tenants of other buildings with cable television. The landlord could not demand payment from either the tenant for permitting CATV (noncrossover), or the CATV company for its crossover installation on the landlord's property in excess of any amount which the State Commission on Cable Television determined by regulation to be reasonable. Prior to the state law, the landlords were paid five percent of the gross revenues the CATV company received from the landlord's tenants (noncrossover). The commission determined that a one-time $1 payment was the proper fee for both the crossover and noncrossover installations. A landlord brought suit against a cable tel-

evision company, alleging that the company's installation was a trespass and, insofar as it relied on the state law, a taking without just compensation.

A divided United States Supreme Court concluded that the physical occupation of the owner's property authorized by the state law constituted a "taking" of property for which just compensation was due. In such circumstances, the owner has an expectation of compensation. The court did not question the State's broad power to impose appropriate restrictions upon the owner's use of his property. The case was remanded in order that the state court could determine the proper compensation the owner should receive for the "taking" of his property.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, was decided June 30, 1982, by a divided court. *American Paper Inst. v. American Elec. Power*, 461 U.S. 402, was decided May 16, 1983, by a unanimous court. Both opinions were written by Justice Marshall. In *Loretto*, the court determined that the State had the power to impose the restrictions upon the landlord's property, but state law did not provide just compensation for the taking. In *American Paper*, the court determined that Congress had properly exercised its authority under the commerce clause when enacting PURPA, since under the act it was necessary to require utilities to make physical connections in order to consummate the purchase of electricity from cogenerators. The court noted that each qualifying cogenerator pays any interconnection costs which the State regulatory authority may assess against the qualifying cogenerator on a nondiscriminatory basis. 18 CFR §292.306(a) (1982).

The KCC argues that the taking comes under the police power of the federal government and that a taking

under the police power can be accomplished without compensation. There is a distinction between the exercise of the police power and a taking by eminent domain. Eminent domain is the taking of property because it is useful to the public, while the police power regulates the use of, or impairs a right in, property to prevent detriment to public interest. In the exercise of eminent domain, private property is taken for public use and the owner is compensated, while the police power regulates an owner's use and enjoyment of property, or deprives him of it, by destruction, for the public welfare, sometimes without compensation other than the sharing of the resulting general benefits. Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power. *Busch v. City of Augusta*, 9 Kan. App. 2d 119, 674 P.2d 1054 (1983).

Congress has provided that the cogenerator pay compensation to KCP&L for the cost of the connection. Since a utility is adequately compensated for the intrusion, it does not matter whether Congress acted under its police power or as an exercise of eminent domain. KCP&L's claim that the taking was without just compensation is without merit.

KCP&L contends that it is forced, without any compensation, to suffer the physical intrusion of power into its system and to surrender to private parties the physical use of its transmission and distribution network. The KCC contends that there is no physical intrusion of the cogenerator's power into the utility's transmission and distribution system, since the transfer of power to KCP&L by the cogenerator occurs at the customer's meter. It contends that, once the power passes through the customer's meter, KCP&L transmits and distributes the power to its customers as needed. We agree.

KCP&L next contends that the statute results in the taking from KCP&L of the right to use its own electrical capacity, without any compensation. KCP&L, when receiving transmissions from cogenerators, must cut back on its own generating capacity and must allow room in its transmission and distribution system for the transmissions from the cogenerators. KCP&L again relies on *Thompson* and *Loretto* for its argument that this is an intrusion which results in a taking without compensation.

This claim is similar to issues previously discussed in this opinion. The transfer of power from the cogenerator to KCP&L occurs at the customer's meter. At that point, it is KCP&L's power that is transmitted through its system. KCP&L's cost of the cogenerated power purchased is passed on to its ratepayers. In return, the utility receives its cost plus a profit guaranteed to the utility under the KCC regulations. This claim is without merit.

KCP&L is not without protection to insure that it is able to render adequate service to its users. 16 U.S.C. § 824k (1982) provides that no order may be issued by the Commission under 16 U.S.C. § 824i (1982) unless the Commission determines that such order:

> "(1) is not likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility . . .
>
> (2) will not place an undue burden on an electric utility . . .
>
> (3) will not unreasonably impair the reliability of any electric utility . . . and
>
> (4) will not impair the ability of any electric utility affected by the order to render adequate service to its customers."

Further protection is provided by our legislature. Electric utilities, to insure the safety and quality of their system, have the right to require the cogenerator to limit the production of power to an amount equal to the load at the cogenerator's facility. K.S.A. 66-1,184.

KCP&L contends that the statutory scheme violates its freedom of contract in three ways: (1) it is not allowed to form its own contracts with the cogenerators, because the statute provides the contract; (2) the compulsory formation and performance of the contract violates the taking clause; and (3) the formation and performance of the contract violates due process.

The Supreme Court has held that freedom of contract is a part of the liberty protected by the due process clauses of the Fifth and Fourteenth Amendments. *Board of Regents v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Freedom of contract, however, is not absolute, for the freedom of contract guaranteed by the Constitution is freedom from arbitrary restraint, not immunity from reasonable regulation. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 (1937). Congress may regulate the making and performance of contracts whenever reasonably necessary to effect any of the purposes for which the national government was created. *Highland v. Russell Car Co.,* 279 U.S. 253, 73 L.Ed. 688, 49 S.Ct. 314 (1929). The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. *Atlantic Coast Line v. Riverside Mills,* 219 U.S. 186, 202, 55 L. Ed. 167, 31 S.Ct. 164 (1911).

KCP&L argues that it can be regulated only with respect to its area of operation, that it holds itself out as a

seller of electricity, and that it, therefore, cannot be forced to become involved in buying electricity.

Among cases cited by KCP&L supporting its argument are:

Transok Pipe Line Co. v. Richardson, 593 P.2d 1079 (Okla. 1978). There, a pipeline company challenged a state statute which required it to connect, at its own expense, and furnish gas to landowners over whose property it had been granted pipeline right-of-way, at less than the cost of the gas furnished. The court concluded that requiring the producer to make gas available for such a purpose was a taking of private property for a private use and in contravention of the state's constitution.

Cal. Water & Tel. Co. v. Public Util. Com., 51 Cal. 2d 478, 334 P.2d 887 (1959). The case involved review of an order of the Public Utilities Commission purporting to modify the terms of a certain contract between the water utility and the developer of a subdivision. The court determined that within the limits of its jurisdiction, the commission could order a public utility to render certain services on certain terms and conditions, and in so doing it was not bound by the terms of a utility's previously negotiated contracts. But, it said that the law is clear that an order directing a public utility to set aside its property for a use other than the public use to which the utility has been dedicated cannot be justified.

Ex parte Goodrich, 160 Cal. 410, 117 Pac. 451 (1911), and *In Re Opinion of the Justices,* 300 Mass. 591, 14 N.E.2d 392 (1938). Both cases deal with statutes requiring electric companies to furnish their consumers with electric light bulbs without charge. In

each case, the court held that the selling of electrical appliances was a business separate and distinct from the manufacture, sale and distribution of electrical energy, and that electric companies could not be required to perform a duty outside their original undertaking, unless they were compensated therefor.

The KCC argues that these cases are not applicable to the present situation because it is within the scope of KCP&L's duty to generate or purchase electric energy for sale to its customers. KCP&L is required to sell electricity, and it must have the electricity available to sell. It can have electricity available by either producing the electricity itself or by buying it from another producer. The federal statutes requiring the utilities to buy from cogenerators are reasonable considering the purpose behind PURPA and that the required purchase of electricity by the utility is not beyond the scope of the service provided by that utility.

Freedom of contract is a qualified and not an absolute right. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Public utilities are subject to regulation to promote the public good. In the present case, KCP&L's freedom to contract or not to contract with the cogenerators is not breached by the regulations promulgated under PURPA. The purchase of power from cogenerators for sale to the utility's customers is not separate and distinct from the manufacture, distribution and sale of the utility's original undertaking.

KCP&L's last contention is that the statutory scheme deprives it of due process of law. It contends that it violates the due process clause because the means Con-

gress employed to accomplish its goals lacks a real and substantial relation to its ostensible end. The basic purpose of PURPA was to cut back on the use of scarce natural gas and imported oil to produce electricity. KCP&L notes that KCP&L uses coal to produce over 96 percent of its electricity, yet cogenerators have the right to burn oil or natural gas to produce the heat that they use to produce electricity. KCP&L contends that whereas the market would encourage these businesses to conserve on oil and natural gas, PURPA artifically rewards them for burning oil and natural gas by requiring entities to pay them money and give them property rights free. Because the electricity cogenerators produce is forced into their system, KCP&L is forced to back down on its generation, which uses fuels other than oil and gas. Thus, generators burning coal must be operated at lower, less efficient levels in order to make room for electricity produced by burning oil and gas.

The guaranty of due process found in the Fifth Amendment of the Constitution declares that no person shall "be deprived of life, liberty, or property without due process of law." If the goals sought by federal legislation are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the due process clause of the Fifth Amendment. *Richardson v. Belcher,* 404 U.S. 78, 30 L.Ed.2d 231, 92 S.Ct. 254 (1971).

The test for due process is whether the legislative means selected has a real and substantial relation to the objective sought. The regulation must be reasonable in relation to its subject and adopted in the interest of the community. *Manhattan Buildings, Inc. v. Hurley,* 231 Kan. 20, 30, 643 P.2d 87 (1982).

Where the requirements of due process are concerned, and in the absence of other constitutional restrictions, the federal government is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare what policy should be, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. There is no task left for judicial determination. Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. *Northern Securities Co. v. United States,* 193 U.S. 197, 337-38, 48 L.Ed. 679, 24 S.Ct. 436 (1904). The legislature is the judge of the necessity of such an enactment, every possible presumption is in favor of its validity, and though the court may hold views inconsistent with the wisdom of the law, it may not annul such law unless it is palpably in excess of legislative power. *Nebbia v. New York,* 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505 (1934).

The federal government may control the conduct of individuals by any regulation which upon reasonable grounds can be regarded as adapted to promote the common welfare, convenience or prosperity. In the present case, the production of electrical power is a relevant concern for Congress. The United States Supreme Court ruled that PURPA was "reasonably adapted to the end permitted by the Constitution." *FERC v. Mississippi,* 456 U.S. 742, 758, 72 L.Ed.2d 532, 102 S.Ct. 2126 (1982). As the Supreme Court has ruled that there was "ample sup-

port for Congress' conclusions," 456 U.S. at 756, it would be difficult for this court to find that there was not. PURPA was designed to encourage increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers. The law has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. Therefore, the requirements of due process are satisfied.

The decision of the district court is affirmed.

APPENDIX B

(Entered April 28, 1982)

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners:

Richard C. (Pete) Loux, Chairman
Jane T. Roy
Phillip R. Dick

IN THE MATTER - of a general investigation to examine pricing of electric utility services as well as their load management and load control programs. (Cogeneration and small power production)	))))))	DOCKET NO. 115,379-U

ORDER ON COGENERATION AND SMALL POWER PRODUCTION

The above-referenced matter comes before the State Corporation Commission of the State of Kansas for consideration and determination. Having heard the evidence and reviewed its files and records in this matter, and being duly advised in the premises, the Commission finds and concludes as follows:

By order of February 6, 1981, the Commission set for hearing the matter of determining pricing of electricity sold by cogenerators and small power producers to regulated electric utilities. On the 2nd of March, 1981, the Commission issued an order postponing the hearing from April 13, 1981 to April 27, 1981. The hearing was duly held on April 27 and 28, 1981, in the Commission hearing room, State Office Building, Topeka, Kansas.

Appearances were as follows:

James Haines, Wichita, Kansas, for Kansas Gas & Electric Company.

Milo M. Unruh, Wichita, Kansas, for Vulcan Materials Company, Chemical Division.

Bernard R. Phillips, Topeka, Kansas, for 34 Rural Electric Cooperatives.

Larry Smukler and John Lungstrum, Lawrence, Kansas, for Parallel Generation Association of Kansas.

Warren B. Wood, Kansas City, Missouri, for Kansas City Power & Light Company.

John K. Rosenberg, Topeka, Kansas, for Kansas Power & Light Company.

Walker Hendrix, Ottawa, Kansas, for Central Telephone & Utilities Company, Western Power Division; and Empire District Electric Company.

Thomas Coleman, Kansas Legal Services, Topeka, Kansas, for Genevieve Brown.

Clifford L. Bertholf, Wichita, Kansas, for Kansas Electric Power Cooperative, Inc.

Mark D. Calcara, Great Bend, Kansas, for Sunflower Electric Cooperative.

George E. Erickson, Jr., Topeka, Kansas, for Martin Tractor Company.

Robert Stoller, Topeka, Kansas, for Kaw Valley Electric Cooperative.

Warren Hummer, Assistant General Counsel, for the Commission's staff and the public generally.

JURISDICTION

The Commission initiated this generic investigation of electric utility pricing and load management and load

control programs pursuant to its authority under K.S.A. 66-101, 66-110 and K.A.R. 82-1-237(c). It stated its intention of investigating cogeneration as an efficient method of producing electric power. Subsequently Congress passed the Public Utility Regulatory Policies Act (PURPA) directing the Federal Energy Regulatory Commission (FERC) to prescribe rules to encourage cogeneration and small power production. FERC issued rules directing state regulatory commissions to hold hearings on these rules. The Kansas legislature passed K.S.A. 66-1,185 to authorize this Commission to carry out the requirements of PURPA. Pursuant to K.S.A. 66-111 and 66-1,185 the Commission has jurisdiction over the subject matter. Notice was served on all parties and in addition notice to the general public was provided by publication in newspapers throughout the state. Thus jurisdiction over the parties is proper. One rural electric cooperative, Kaw Valley, failed to provide notice. Since its service territory is served by basically the same newspapers as KPL's, the Commission finds that its customers received adequate notice.

At the hearing the following witnesses testified:

Neel Holler, Rate Design and Depreciation Administrator, 4th Floor, State Office Building, Topeka, Kansas, for the Commission staff.

Paul A. Ballonoff, Rate Design and Depreciation Analyst, 4th Floor, State Office Building, Topeka, Kansas, for the Commission staff.

John S. Dunn, Economist, Drees, Dunn Lubow and Company, Overland Park, Kansas for Sunflower Electric Cooperative, Inc.

William L. Bryant, Manager-Energy, Chemicals Division, Vulcan Materials Company, for the Wichita, Kansas Vulcan Materials Company.

Phillip A. Lesh, manager, for Norton-Decatur Cooperative Electric Company, Inc., Norton, Kansas.

William E. Brown, Vice-President, Revenue Requirements, for Kansas Power and Light Company, Topeka, Kansas.

Robert B. Sullivan, Manager of Rates and Regulation, for Kansas City Power and Light Company, Kansas City, Missouri.

John Anthony Fox, Fellow in Economics, Energy Law Institute, Concord, New Hampshire, for the Parallel Generation Association.

Steve Blake, Oskaloosa, Kansas, for the Parallel Generation Association of Kansas.

Ronald E. Garchar, Manager, for Brown-Atchison Electric Cooperative Association, Inc., Horton, Kansas.

Steven E. Collier, consulting engineer, C.H. Guernsey & Company, Oklahoma City, Oklahoma, for 34 Rural Electric Cooperatives.

Earnest A. Lehman, Assistant Manager of Rates, Wichita, Kansas, for Kansas Gas and Electric Company.

Jerry M. Haahr, Electrical Engineer, Topeka, Kansas, for Kansas Electric Power Cooperative, Inc.

Scott Keith, Drees, Dunn Lubow and Company, Overland Park, Kansas, for Sunflower Electric Cooperative, Inc.

Keith M. Farrar, representative, Hugoton, Kansas.

Introduction

Cogeneration is the combined production of electrical power and useful thermal energy, such as heat or steam. By producing heat and electricity in one process fuel consumption can be reduced by as much as one-half. Al-

though cogeneration is not a new concept there was little interest in it as long as the cost of electricity remained stable or even decreased. The rapid increase in the cost of electricity in recent years has led to considerable interest in cogeneration as an economical source of power.

Small power production facilities are those which use biomass, waste, geothermal resources or renewable resources, such as wind, solar energy and water to produce electricity. For purposes of this order the term cogenerator will be used to refer to both cogenerators and small power producers.

PURPA was enacted to remove three major obstacles to cogeneration: first, utilities were generally unwilling to purchase the power produced by cogenerators or at least to pay an appropriate rate; second, discriminatorily high rates were sometimes charged for back-up service, and third a cogenerator ran the risk of being considered a public utility and thus subject to state and federal regulation.

Congress designed section 210 of PURPA to remove these barriers to development of cogeneration. PURPA required that utilities purchase electric energy from cogenerators and provide back-up power on a nondiscriminatory basis. It also directed the Federal Energy Regulatory Commission (FERC) to prescribe rules to encourage cogeneration.

FERC issued rules regarding cogeneration rates and set criteria for determining "qualifying facilities". These FERC rules ordered state commissions to hold hearings on cogeneration and to set rates for purchases equal to full avoided cost. The avoided cost is the incremental cost which the utility would incur if it supplied the power produced by the cogenerator. The rules also ordered

electric utilities to sell energy and capacity to cogenerators at nondiscriminatory rates. They gave state commissions the power to set standards for system safety and reliability and put the costs for interconnection on the cogenerator. The rules also exempted cogenerators from certain federal and state regulation and established criteria for "qualifying facility" status.

Mississippi challenged PURPA generally as being unconstitutional. A Mississippi Federal District Court found certain portions of PURPA, among them section 210, unconstitutional. *State of Mississippi et al. v. Federal Energy Regulatory Commission* (No. J 79-0212(c), U.S. District Court, S.D. Miss.) This decision was appealed to the U.S. Supreme Court, which at this date has heard the case, but not yet issued a decision.

The FERC rules on cogeneration and small power production were also challenged in *American Electric Power Service Corporation et al. v. Federal Energy Regulatory Commission* (United States Court of Appeals D. C. No. 80-1789). The Court ordered FERC to reconsider the rules which required utilities to pay full avoided cost for power purchased from cogenerators and vacated the requirement that any utility interconnect with any cogenerator as being inconsistent with PURPA. For some time then there has been considerable uncertainty surrounding the validity not only of the FERC rules, but of PURPA as well. This uncertainty has caused the Commission to move slowly on this issue, since a decision based on the FERC rule, might be subject to change at any time. If we had established a rate which might have to be lowered in the near future, any investment decision made on such a basis could turn out to be unprofitable and detrimental to investors. Such a situation is obviously undesirable.

In 1979 the Kansas legislature had passed the Parallel Generation statute K.S.A. 66-1,184. It requires electric utilities to purchase power from their customers which generate power. Under this state statute a cogenerator enters into a contract with the electric utility for the sale of power. If the parties cannot agree on the terms of the contract this Commission has jurisdiction to settle any dispute. Very few states have state legislation on this issue. Thus, since 1979 there has been a mechanism available in Kansas for dealing with problems relating to cogeneration. Any cogenerator encountering problems had merely to avail himself of the legislatively established procedure.

Commission Intent

In view of the numerous problems incident to the federal rules this Commission has decided to proceed in the spirit of Congressional intent expressed in PURPA but primarily relying on state law. We recognize that the evidence presented at the hearing resulted from requirements in the FERC rules and our decision is based on the evidence presented at the hearing but in such a manner as to place our reliance on state law.

The primary concern of the Commission at this hearing was to consider the rate to be paid to cogenerators for their power and the kind of data needed to determine these rates.

FINDINGS AND CONCLUSIONS

Being fully advised in the premises, and having given due consideration to PURPA, the FERC rules and the evidence, as well as the Commission's files and records, the Commission makes the following findings:

AVOIDED COST - ENERGY COMPONENT

The FERC rules define the energy component of avoided cost in terms of incremental cost of electric energy, which the utility would have to either generate or purchase from another source, if it did not buy it from the cogenerator. The rules further require that data be submitted by the utilities stating their energy costs in cents per kilowatt-hour during daily and seasonal peak and off-peak periods, by year for the current calendar year and each of the next five years. The rules also authorize the use of alternative data.

Staff witness, Ballonoff, recommended that test year data be used in computing the rate for puchases for cogenerators, since test year data is used to determine all other rates. He recommended that an inverse loading order be established for each utility and that energy cost be computed in cents per Kwh for each generating unit. The particular utility's generating units are then listed from highest energy cost to least energy cost - the opposite order of that in which the utility would dispatch its units. The energy cost payment made to cogenerators as computed by staff's methodology would then consist of the fuel cost for the units with the highest fuel costs (including fuel related operations and maintenance costs) for the appropriate costing periods. The assumption behind this recommendation is that the highest cost plant would be replaced by cogenerated power. Although this manner of computing the energy cost is not what is ordinarily referred to as incremental cost Mr. Ballonoff asserted that the actual result is very close to the amount which would be arrived at by determining the utility's incremental cost by use of the data recommended by FERC. This assertion was not contradicted. Staff recommends that utilities

which purchase their power shall pay the energy component of their wholesale rate.

The utility companies are in agreement with staff and the FERC rules that cogenerators should be paid the utility's avoided fuel cost. William Brown testifying for KCPL stated that rates paid to cogenerators should be the lower of incremental energy costs or a "just and reasonable" rate. Earnest Lehman of KG&E testified that *standard* rates should be based on avoided energy costs. He further recommended that the avoided energy cost be determined by using a two-dial Kwh meter that would determine sales for peak and off-peak periods. The hourly incremental costs would then be averaged over a monthly period. John Dunn testifying for Sunflower stated that the allowance paid for energy should be the avoided cost of the utility, which for a cooperative would be equal to the energy component of purchased power cost as adjusted. Other utility witnesses offered similar testimony.

The Commission finds that there is general agreement that avoided energy cost should be paid to cogenerators. Kansas electric utilities bill their customers based on average embedded cost. Cogenerators should be paid on the same basis. For generating utilities this cost should be determined by including the costs which are used in determining the energy cost adjustment base. The appropriate ECA shall also be included. For cooperatives which purchase their power the appropriate amount would be equal to the energy component in their wholesale rates, since this is the energy cost which the cooperative in fact avoids.

CAPACITY CREDIT

The FERC rules define the capacity cost component in terms of the increment cost of capacity which the

utility would have to generate or purchase from some other source if it did not buy from the cogenerator. The rules further require that data be submitted by the utilities stating their plan for addition of capacity by amount and type, for purchases of capacity and for capacity retirements for each year during the following ten years the estimated capacity costs shall be expressed for individual generating units and individual planned firm purchases. The Section-by-Section analysis preceding the rules clarifies the concept "avoided capacity cost." It states that the utility avoids capacity cost if it is able to avoid the need to construct a generating unit, or is able to build a smaller, less expensive plant, or to reduce firm power purchases from another utility because of power supplied by cogenerators. The rules do provide that state commissions may require alternative data.

The evidence presents us with considerable controversy surrounding the payment of capacity credit to cogenerators. The FERC rules further state that certain factors, such as availability at system peak, reliability of the cogenerator and ability of the utility to dispatch the facility, shall be considered in determining the capacity credit.

Staff witness Ballonoff recommended that a capacity credit be paid to cogenerators. He computed this capacity credit on the same basis as the avoided energy cost, by utilizing the inverse loading order for each utility established on the basis of descending energy costs, so that the most expensive plant would be taken off the line first and the payment to cogenerators is based on the cost of that plant. As more cogenerators come on line, the utility would need to move down the inverse loading order to the next most expensive plant and continue in descend-

ing order. Staff witnesses Ballonoff and Holler both testified that in their opinion it was essential to provide for a capacity credit in the rate paid to the cogenerator in order to provide encouragement for this promising source of lower cost electricity. Specifically with regard to wind-generators they contended that it was inappropriate to look at one isolated facility and conclude that it did not provide capacity, but rather to look at the capacity provided by the class of wind-generators or other class of cogenerators. Mr. Holler argued that at some time during each billing period any given cogeneration unit would provide its rated output. Although he agreed that there is no reason to believe that this time would coincide with the system peak, in staff's opinion this should not be the sole determinant of whether a capacity payment is paid to the cogenerator.

Mr. Ballonoff's methodology establishes the avoided capacity cost as the carrying charge for each generating unit in terms of dollars per kilowatt. The carrying charge would include at least return, tax and depreciation. In his opinion the carrying charge is appropriate to use for this determination since it represents the current expense to the utility. The amount arrived at as the carrying charge per unit would then be modified depending on the reliability of the class of cogenerators. Mr. Ballonoff recommended that for utilities which purchase all their power the equivalent of the carrying charge be the capacity component of their wholesale rate. This capacity cost would then be subject to the same modifications as that of generating utilities.

The utility witnesses all testified against routinely including any form of capacity credit. Some would include it in the rate paid to cogenerators under certain circum-

stances, basically if the cogenerator is likely to provide power at the system peak. Earnest Lehman of KG&E testified that the *standard* rate should reflect the current avoided energy cost only and that capacity cost payment should be given only to cogenerators which provide firm capacity. He also took the position that any payment of capacity costs would require a contract between the utility and the cogenerator. KEPCo's witness, Jerry Haahr, also testified in favor of some capacity credit if the cogenerator had a high probability of operating on peak, as did Scott Keith for Sunflower. John Dunn, who also testified for Sunflower, stated that the Commission should undertake a time metered study to determine the capacity contribution of alternative power sources prior to determining any capacity allowance. Steven Collier who testified on behalf of Thirty-Four Rural Electric Cooperatives also stated that capacity credit should be determined on a contractual basis. He opposed staff's recommendation to use an arbitrary capacity credit when detailed data was lacking. He also expressed concern that the use of staff's methodology would result in improper price signals which might lead to bad investment decisions. Mr. Garchar, who also testified for Thirty-Four Rural Electric Cooperatives, discussed the problems encountered by cooperatives with all requirements contracts. He asserted that payment of a capacity credit to a cogenerator, absent an assurance that the cogenerator would be providing capacity at the peak, would increase costs to the other members of the cooperative, since the cooperative would not be able to reduce its capacity costs for purchases from its supplier. In order to establish a fair capacity credit, he recommends that the generating utilities determine criteria for capacity credits which cooperatives can pass on. Mr. Brown testifying for KP&L opposed any form of capacity credit

for cogenerators on KP&L's system at this time because no changes can be made to presently planned capacity additions. He asserted that any capacity credit at this time would be unfair to other customers. Mr. Sullivan in his testimony for KCPL stressed that the utility should pay cogenerators based on its actual cost savings and that in no event should realized savings be replaced by "anticipated future savings."

The consensus among utility witnesses then is that capacity credit should be paid only to cogenerators which provide capacity at the system peak and provided that the utility can actually avoid some capacity costs.

The Parallel Generation Association of Kansas intervened and testimony was presented on its behalf by John Fox and Steve Blake. Mr. Fox testified to different methods for determining avoided cost in accordance with the FERC rules, and recommended data which the Commission should collect for such a determination. Mr. Blake testified in favor of paying some capacity credit even in the absence of reliable data. His primary concern is with wind systems and although he agreed that capacity credits should be based on actual data, he felt that in the meantime reasonable assumptions should be made and some capacity credit allowed. He also addressed the testimony of Phillip Lesh testifying for Norton-Decatur Electric Cooperative concerning a particular wind-machine which did not operate reliably. Mr. Blake stated that there was general agreement that this particular wind-generator did not operate properly, but that the failure of one machine is not a sufficient basis for judging all. Representative Keith Farrar agreed that although wind systems are considered to be unreliable, some capacity credit is justified.

The Commission has seriously considered the arguments brought to bear on this issue. Kansas electric utilities have surplus capacity at this time and for the indefinite future. No additional generation facility construction is anticipated in the near future. It is therefore impossible to determine a capacity credit on the basis of FERC's rules. As indicated we are making our determination on the basis of state law. We are mindful of our role in protecting ratepayers and certainly do not desire to increase their rates for electricity unless they would be likely to reap benefits from this technology. It is apparent to us that any benefits from cogenerated power will be realized only on a long term basis, and may appear to be of no benefit and possibly even of some detriment in the short run. In this time of rising energy costs and of increasing costs associated with all large plan additions it seems to us that we must take the long term view. In the long run cogeneration may provide power at a lower cost than new large generating facilities. Therefore, we find it desirable to encourage cogeneration. We are concerned that an energy payment alone may not provide sufficient incentive to cogeneration. We are also concerned, however, that we do not determine a rate which sends false signals to cogenerators or penalizes other customers. We find staff's argument that some capacity credit should be included in the rate paid to cogenerators persuasive; capacity is provided to the utility, and the cogenerator should receive some compensation for it. Since we find that full avoided cost, as defined in the FERC rules, is not appropriate, but feel that an incentive payment for capacity is appropriate we find that the capacity payment to cogenerators should be equal to 50% of the per unit authorized rate of return on the utility's net production plant (USOA accounts 310-346 minus accumulated depre-

ciation) as determined in the utility's latest rate case. A sample calculation is set out in the attached appendix. Electric cooperatives shall pay 50% of the capacity component of their wholesale rates. We therefore, direct the utilities to file within three months of the date of this order, a tariff for facilities of less than 100 Kw which includes such a capacity credit. Such filings shall be subject to review by Commission staff, approval by this Commission and subsequent consideration in a rate case. For facilities which are larger than 100 Kw we find contractual agreements appropriate. These contracts shall also be subject to Commission approval.

Witnesses for the cooperatives expressed concern over conflict between the requirement to buy power from cogenerators and their "all requirements" contracts with their suppliers. The FERC addressed this issue in the Section-by-Section analysis stating that such contractual obilgations could not be permitted to override the obligation to purchase from cogenerators. We are in agreement that such contract do not relieve any utility of the obligation imposed by both state and federal law to purchase power from cogenerators.

INTERCONNECTION COSTS

The FERC rules require that each cogenerator pay interconnection costs as assessed by the state commission, on a nondiscriminatory basis with respect to other customers with similar load characteristics. Staff witness, Holler, recommended that interconnect and metering costs be included in the utility's rate base and thus paid for by all customers. The utility witnesses, without exception opposed this treatment and testified that each cogenerator should pay the costs which he causes. To include these

costs in the rate base would raise the cost of service to all customers. Mr. Holler argues that the inclusion of interconnection costs in the rate base is within the spirit of the FERC rules since in the long term view all customers should benefit from this potentially cheaper capacity coming on line. Staff and all utility witnesses agree that two meters should be used because of the need to determine how much capacity is provided by cogenerators. Representative Farrar argues that for small cogeneration units - those with a capacity of less than 25 Kw - only one meter should be used.

The Commission generally supports the concept that costs should be allocated to those that cause them. In accordance with that concept we find that reasonable interconnection costs should be paid by cogenerators. This Commission will, in case of dispute, make the ultimate determination of the reasonableness of any interconnection requirements, as we did in Docket 125,436-U regarding the requirement of a disconnect device for cogenerators. We also find that two meters are appropriate and find that the cogenerator should pay for the costs of the meter which records purchases from the cogenerators. Since the cogenerator pays such costs there shall be no customer charge imposed on the cogenerator, other than that which is paid by all customers *buying* power from the utility.

Mr. Holler has recommended that 50% of the test year annual line loss percentage be applied to increase the price paid to cogenerators. His reasons for this recommendation are that cogeneration units are spread throughout the system and this random spread will operate to to reduce the line losses. The Commission finds a line loss credit appropriate and directs that it be calculated as shown in the attached appendix and included in the pay-

ment to the cogenerator. We would be prepared to reconsider this determination in a rate case based on evidence presented to us.

Jerry Haahr in his testimony expressed concern over problems which might arise as a result of cogenerators coming on line. His concerns related primarily to safety and operation of the distribution system, the possibility of interference with telecommunications, radio, television, electric system operations and other systems. His testimony is speculative and cites no actual problems which have occurred. This Commission is aware that problems may occur; we do not, however, intend to anticipate problems. We have already considered safety concerns in Docket 125,436-U and would be prepared to resolve additional concerns in a similar manner.

The FERC rules make it clear that cogenerators always are free to contract out from under any rate set by the Commission. We find that a tariff should be established by each jurisdictional utility for facilities with a capacity of less than 100 Kw and order that such a tariff be filed in accordance with our findings in this order. We find that larger facilities should contract separately with the utility. Any such contract should not discriminate in favor of any particular cogenerators.

Any contracts entered into between utilities and cogenerators shall be filed with this Commission.

RATES FOR SALES

The FERC rules require that rates for sale to cogenerators shall be just and reasonable and nondiscriminatory. Staff recommended that power sold to a cogenerator be priced the same as power sold to any other customer in that class. There was basic agreement on this issue

and we find that this is the appropriate way to price such sales.

IT IS THEREFORE BY THIS COMMISSION ORDERED THAT:

1. Jurisdiction over the electric utilities subject to this order is proper pursuant to K.S.A. 66-111 and 66-1,185.

2. All electric utilities shall file tariffs for payment to cogenerators with a capacity of less than 100 Kw in accordance with our determinations as set out above.

3. The utilities shall enter into contracts with cogenerators with a capacity of more than 100 Kw.

4. All such contracts shall be filed with this Commission.

5. Interconnection and metering costs shall be paid by cogenerators. Two meters shall be used; one for purchases, one for sales. Utilities shall not assess a customer charge in association with the meter which records purchases from cogenerators.

6. Concerns regarding interference and safety will be addressed by this Commission on a case by case basis, in accordance with previous practice.

Dated April 28, 1982

Loux, Chmn.; Roy, Com.; Dick, Com.

/s/ Carol J. Larson
Carol J. Larson
Executive Secretary

EP:tmc
D:15

ORDER MAILED APR 30 1982

APPENDIX

SAMPLE COGENERATION PURCHASE CALCULATION

CAPACITY CREDIT:

Gross Production Plant Invest. (Accounts 310-346)	$1,000,000
Less Accumulated Depreciation	200,000
Net Production Plant	800,000
50% of Authorized Rate of Return	x .05
	40,000
Test Year Annual Production (KWH)	÷10,000,000
Capacity Credit ($ per KWH)	.004

ENERGY CREDIT:

($ per KWH) (determined on the basis of ECA base + ECA)	.025
($ per KWH)	.029
Line Loss Adjustment*	x 1.04
Purchase price ($ per KWH)	.03016

* Percentage utilized should be 1/2 of test year line loss percentage expressed as a decimal plus one. In the above, test year line loss was 8%.

APPENDIX C

(Entered June 18, 1982)

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners:

Richard C. (Pete) Loux, Chairman
Jane T. Roy
Phillip R. Dick

IN THE MATTER – of the applications by KCP&L and 34 Rural Electric Co-operatives in the matter of a general investigation to examine pricing of electric utility services as well as their load management and load control programs. (Cogeneration and small power production).	))))))))	DOCKET NO. 115,379-U

ORDER ON APPLICATIONS FOR REHEARING

The above-referenced matter comes before the State Corporation Commission of the State of Kansas as a result of applications for rehearing of the Commission's order in this docket, filed by Thirty-Four Rural Electric Cooperatives and Kansas City Power and Light Company. Oral argument was scheduled for June 3, 1982 for the purpose of determining whether rehearing should be granted. Having heard the arguments of counsel and being duly advised in the premises the Commission finds and concludes as follows:

1. The oral argument was duly held on June 3, 1982, in the Commission hearing room, State Office Building, Topeka, Kansas.

Appearances were as follows:

Warren B. Wood, Kansas City, Missouri, and Arthur J. Doyle, Kansas City, Missouri, appearing on behalf of Kansas City Power and Light Company.

Bernard R. Phillips, III, Topeka, Kansas, on behalf of 34 Electric Cooperatives.

James Haines, Wichita, Kansas, on behalf of Kansas Gas and Electric Company.

Mark Calcara, Great Bend, appearing on behalf of Sunflower Electric of Great Bend, Kansas.

Clifford Bertholf, Wichita, Kansas, appearing on behalf of Kansas Electric Power Cooperatives.

Eva Powers, appearing on behalf of the Commission's staff and the public generally.

George Erickson, Jr., Topeka, Kansas. (Made appearance after the record was closed representing Martin Tractor Company).

2. Notice was provided to all parties of record and the Commission finds that it has jurisdiction over the parties and the subject matter.

3. Mr. Doyle for KCPL argued that any Federal or State Law requiring public utilities to buy anything, in this case electricity produced by cogenerators, is an intrusion into KCPL's freedom of contract and therefore unconstitutional. The *Memorandum in Support of the Application* makes that point in detail. Mr. Doyle did state that he knew of the Commission's limited jurisdiction with respect to constitutional issues (TR.12). Staff counsel agreed that the Commission's jurisdiction over constitutionals matters is limited and recommended that the Commission consider federal and state laws directing or authorizing it to perform certain actions constitutionally

valid. The Commission agrees with staff argument, we cannot enter into an investigation of constitutionality. We, therefore, do not reach the specific arguments. Our work would be severely disrupted, if we were to inquire into the constitutionality of each requirement imposed on us by federal and state laws. We, therefore, decline to consider this issue on rehearing.

4. Mr. Doyle also asked the Commission to redefine cogeneration so as to prevent cogenerators from using natural gas and oil as a fuel since the use of such fuels would be contrary to the congressional intent expressed in PURPA of reducing the dependence on these scarce fuels. The Commission agrees that the use of these scarce fuels for cogeneration may not be desirable. Section 201 of PURPA appears to reserve the authority to determine fuel use to FERC. We are not prepared to concede preemption on this issue and are particularly concerned with requiring the filing of tariffs for facilities of less than 100 Kw capacity which are fueled with oil and natural gas. We feel this is an appropriate subject for rehearing.

5. In its *Application for Rehearing* KCPL asserted that the Commission had improperly asserted jurisdiction under K.S.A. 66-1,185. This argument was not pursued in oral argument. We presume, because the United States Supreme Court had upheld the constitutional validity of PURPA, and we had asserted jurisdiction under K.S.A. 66-1,185 which authorizes us to comply with PURPA. We observe that our jurisdiction was properly asserted, since a Mississippi Federal District Court judgment is not valid in Kansas and PURPA therefore was in effect, although surrounded by uncertainty.

On oral argument Mr. Wood asserted that the Commission lacked jurisdiction to set rates for power sold by

cogenerators. We disagree since our jurisdiction is proper under PURPA, even though we chose not to follow the Federal rules to the letter. We will not rehear this issue.

6. KCPL and the RECs both argue that the 50% capacity credit which the Commission ordered the utilities to include in the rate paid to cogenerators is arbitrary and has no basis in the evidence. There is evidence in the record that *some* capacity credit should be provided. Absent reliable data we chose a figure which based on the evidence seemed reasonable. The testimony ranged from zero capacity credit to full avoided cost. We chose 50% in spite of the fact that no specific evidence as to the 50% figure was presented, in order to arrive at a figure which seemed reasonable to us.

Staff presented a methodology for arriving at a capacity credit in the hearing. FERC requires that a capacity credit be determined. No utility presented any alternative; testimony by the utilities generally just indicated that no capacity credit should be given. Steve Blake and John Fox testified for the Parallel Generation Association that capacity credit is justified. In its order the Commission attempted to strike a balance between no capacity credit and full capacity credit. The Commission is committed to providing some capacity credit. The evidence convinces us that it is warranted. The cooperatives also argue that the capacity credit as set out in our order discriminates against them.

The Commission believes that its decision in the April 28, 1982, order on capacity credit was reasonable. We do, however, realize that this is an issue on which considerable difference of opinion exists. In view of the significance of the issue we will permit rehearing on the capacity credit issue. The Commission is hopeful that the

parties will present evidence and methods of computation at the rehearing for us to consider in the determination of a capacity credit.

7. The Cooperatives also argue that the Commission's determination of payment for interconnection costs is unlawful and unreasonable. Staff counsel stated that there seems to be a conflict between the FERC rules and K.S.A. 66-1,184. The FERC rules require that all reasonable interconnection costs be paid by cogenerators. The reasonableness of the cost is to be determined by the state commissions. K.S.A. 66-1,184 seems to require that certain costs be paid by the utilities.

The Commission finds that its determination in the April 28 order was reasonable. We are, nevertheless, concerned about this apparent conflict, especially since the United States Supreme Court has now declared PURPA to be constitutional. We will therefore permit rehearing on the issue of interconnection costs.

8. In its *Application for Rehearing* the Cooperatives asserted that the Commission's determination of line loss credit was arbitrary and unreasonable. In his oral argument, Mr. Phillips did not address this issue. The Commission finds that its determination was reasonable, and we point out that we indicated our willingness to consider additional evidence on this matter in upcoming rate cases. We decline to rehear this issue.

9. The rehearing on the above indicated issues shall be held in the Commission's hearing room, 4th Floor, State Office Building, Topeka, Kansas on August 18, 1982, at 10:00 a.m. All parties and intervenors shall prefile testimony on or before July 23, 1982. Staff shall file its testimony on or before August 10, 1982.

IT IS THEREFORE BY THIS COMMISSION ORDERED THAT:

1. Jurisdiction over the parties is proper since proper notice was given.

2. A rehearing will be held on August 18, 1982 at 10:00 a.m. on the issues of capacity credit, requiring tariffs for facilities of 100 KW or less which use oil and natural gas as a fuel, and payment of interconnection costs only.

3. Parties and Intervenors shall prefile testimony on or before July 23, 1982. Staff shall prefile testimony on or before August 10, 1982. The Commission retains jurisdiction over the parties and the subject matter for the purpose of entering such further order or orders as from time to time it may deem proper.

Dated June 18, 1982

Loux, Chmn.; Roy, Com.; Dick, Com.

/s/ Carol J. Larson
Carol J. Larson
Executive Secretary

EP:tmc E.P.
D:15

ORDER MAILED JUN 18 1982

APPENDIX D

(Entered November 5, 1982)

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners:

Richard C. (Pete) Loux, Chairman
Jane T. Roy
Phillip R. Dick

In the matter of a general investigation to examine pricing of electric utility services as well as their load management and load control programs. (Cogeneration and Small Power Production)	))))))	Docket No. 115,379-U

ORDER ON REHEARING

The above-referenced matter comes before the State Corporation Commission of the State of Kansas for consideration and determination. Having heard the evidence and reviewed its files and records in this matter, and being duly advised in the premises, the Commission finds and concludes as follows:

On April 28, 1982, the Commission issued its order on cogeneration and small power production. Kansas City Power and Light Company (KCPL) and Thirty-four Rural Electric Cooperatives filed a timely application for rehearing of certain issues determined in that order. On June 3, 1982, oral argument was held to determine whether rehearing should be granted. The Commission issued an order on June 18, 1982, in which it granted rehearing on

three issues: fuel use, interconnection costs and capacity credit.

1. The rehearing was duly held on August 18, 1982, in the Commission hearing room, State Office Building, Topeka, Kansas. Appearances were as follows:

Warren B. Wood, Kansas City, Missouri, for Kansas City Power & Light Company.

Bernard R. Phillips, III, Topeka, Kansas, for 34 electric cooperatives.

John Rosenberg, Topeka, Kansas, for the Kansas Power and Light Company.

James Haines, Wichita, Kansas, for Kansas Gas and Electric Company.

Clifford L. Bertholf, Hutchinson, Kansas, for Kansas Electric Power Cooperative, KEPCo.

Mark Calcara, Great Bend, Kansas, for Sunflower Electric Cooperative, Inc.

James C. Mordy, Kansas City, Missouri, for Midwest Energy, Inc.

George Erickson, Topeka, Kansas, for Martin Tractor Company.

Eva Powers, Assistant General Counsel, for the Commission's staff and the public generally.

2. Notice was provided to all parties of record and the Commission finds that it has jurisdiction over the parties and the subject matter.

3. Testimony was prefiled by the following individuals:

For Kansas City Power and Light Company: Jack N. Jester, J. Michael Evans, William K. Dermann, A.L. Samuels, Chris B. Giles;

For Midwest Energy: Dick Compton;

For the Commission staff: Paul A. Ballonoff;

For the Thirty-four Rural Electric Cooperatives: Steven E. Collier;

For Martin Tractor Company: Doug Wallace.

4. The Commission in its June 18, 1982 order limited the rehearing to three issues: fuel use, interconnection costs and capacity credit. Although we believed then, as we do now, that our capacity credit determination was reasonable we granted rehearing on this issue because of its significance and the dissatisfaction expressed with it. In our order we expressed the hope that the parties would present us with evidence and methods of computation which would permit us to make a valid comparison between the capacity credit which we had determined and some other workable methodology.

5. When we issued our order of April 28, 1982, there was considerable uncertainty regarding the validity of PURPA and the rules promulgated pursuant thereto. We, therefore, chose to proceed in the spirit of PURPA but placed our primary reliance on the state Parallel Generation statute, K.S.A. 66-1,184. Since that time, the United States Supreme Court has handed down a decision in *Federal Energy Regulatory Commission et al. v. Mississippi et al.* No. 80-1749 (1982) upholding the constitutionality of PURPA. Thus, we are no longer faced with total uncertainty. However, FERC has petitioned for *certiorari* in another case, *American Electric Power Service Corporation et al. v. Federal Enegy Regulatoy Commission* No. 80-1789 (1982). The issue of concern to us in this hearing which could be affected by a decision in that case is capacity credit.

CAPACITY CREDIT

KCPL proposed a modification of the method ordered by the Commission. An adoption of this modification would result in a capacity credit only being paid to those cogenerators and small power producers which provide power during the utility's peak season - June-September. However, merely providing *some* capacity during the peak period would not be sufficient to receive a capacity credit. According to this modification "[a] facility which delivers less than 1,172 hours of its nameplate capacity for the previous June-September period will be deemed to have delivered only off-peak energy and will receive a capacity credit equal to $0.000/Kwh." Giles Tr. 101-102. The Cooperatives presented no methodology for determining capacity credit. Their witness, Collier, asserted that capacity metering is necessary in order to develop such a credit. Witness Wallace, for Martin Tractor Company testified that he believed that the Commission's determination was reasonable. Staff witness, Ballonoff, did not present any additional testimony on this issue but indicated that he believed that his methodology presented in the original hearing remained a viable alternative, should the Commission wish to alter its determination.

We are disappointed that, although KCPL and the Cooperatives state that they favor cogeneration and small power production, they have failed to provide us with any viable alternatives. It appears that their main purpose is to attempt to defeat any capacity credit in spite of our clear indication that we find a capacity credit appropriate and are committed to including one in the payment to cogenerators and small power producers. The modification of our determination by KCPL is, in our opinion, too limiting. We especially cannot accept that some produc-

ers which do provide capacity on peak will get no capacity credit. We, therefore, do not alter our capacity credit determination for generating utilities.

The coops have recommended additional metering. We are not prepared to require an additional costly meter to measure capacity. For small facilities - the ones we are concerned with in this instance - such a cost is not warranted. Should the utility desire such a meter, it may install one at its own expense and file an appropriate tariff with the Commission.

We realize that our determination may be mooted by decisions either by the United States Supreme Court or the Congress. However, it is essential that a tariff applicable to facilities of less than 100 Kw be filed with all due speed. As stated in our April 28, 1982 order, the companies may present evidence based on actual data in future rate cases demonstrating any need to alter this determination.

CAPACITY CREDIT DETERMINATION FOR NON-GENERATING UTILITIES

The Cooperatives have also asserted that the formula which the Commission specified for non-generating utilities - 50% of the capacity component of their wholesale rates - is discriminatory in that it includes costs which are not included in the capacity credit determined for the generating utilities. We agree with staff's brief that this issue merits our consideration. The Cooperatives' witness, Collier, stated several reasons why the demand component of the wholesale rate would be larger than the rate of return on net production plant. He stated that in addition to what is included for the generating utilities the wholesale demand component may include return on

plant other than production plant, certain other fixed expenses and investment costs, ratchet charges and certain other differing cost allocations. Collier, Tr. 189-190. His Exhibit, No. 5 indicates a wide discrepancy in the capacity credit computed for two generating utilities and two non-generating utilities purchasing from each of those utilities under our present determination. The Commission has no way of determining the accuracy of these figures and they were in fact presented with the caveat that adequate data was not available. Even if not taken at face value, they indicate a discrepancy and the evidence is sufficiently persuasive to convince us that we must alter our determination so as to ensure that non-generating utilities pay the same capacity credit as generating utilities. We, therefore, find that a non-generating utility shall pay the same capacity credit as the utility from which it purchases power. In a situation where a non-generating utility purchases power from more than one generating utility the capacity credit shall be equal to that of its principal supplier.

FUEL USE

Congress in Section 201 of PURPA clearly gives the authority for determining fuel usage to FERC. The FERC has promulgated rules regarding fuel use. Section 292.204(b) addresses the fuel use issue for small power producers. It permits the use of oil and natural gas of no more than 25 percent of the total energy input of the facility during any calendar year period. For cogenerators the permitted fuel use is linked to the performance efficiency of the unit. Section 292.205 specifies first that for any topping-cycle cogeneration facility the useful thermal energy output must be a minimum of 5 percent of the total energy output during the calendar year. The rule

then goes on to state that if any of the energy input is oil or natural gas, for a facility for which installation began after March 13, 1980, then the useful power output plus one-half the useful thermal energy output must be no less than 42.5 percent of the total energy input of oil and natural gas. That figure is increased to 45 percent if the useful thermal energy output is less than 15% of the input of oil and natural gas.

For a bottoming-cycle cogeneration facility which uses any natural gas or oil for supplementary firing and the installation of which began after March 13, 1980, the useful power output must be 45 percent of the energy input of oil and natural gas. (Supplementary firing is defined in 292.202(f) as an energy input to the cogeneration facility used . . . only in the electric generation process of a bottoming-cycle cogeneration facility.)

KCPL addressed the fuel use issue on rehearing through voluminous testimony. None of KCPL's witnesses addressed the FERC requirements and thus provided the Commission with no indication of why these rules are not adequate or whether they had given them any consideration. In its brief KCPL states that *no* oil or natural gas usage should be permitted for cogeneration facilities. KCPL argues that permitting the use of *any* oil or natural gas for this purpose would contravene the basic intent of PURPA. Midwest Energy filed testimony supporting KCPL's position. In its brief, Kansas Power and Light Company (KPL) supports KCPL's position. The Coops and Martin Tractor Company testified that in their opinion the FERC rules adequately covered this issue. (Collier, Tr. 210; Wallace, Tr. 233.) Staff argued in its brief that Congress has preempted inconsistent state action and that even if it had not that the FERC rules were appropriate

and that this Commission should refrain from additional regulation on this issue.

This Commission does not agree that it is preempted from acting. We do, however, agree that the FERC rules are appropriate and adopt them as governing fuel use in Kansas. We specifically reject the argument that no oil or natural gas usage should be permitted since this would be contrary to the intent of using waste heat to generate electricity. We have here a situation where oil or natural gas would be used anyway and the recognition of these units as cogenerators prevents waste, and permits more efficient use of the particular fuel through cogeneration. This was precisely the intent of Congress in addressing this issue. The FERC went through a lengthy rule making proceeding in adopting these rules. It is not reasonable to assume that it did not carefully weigh the implications of allowing a certain usage of oil and natural gas. In fact, the discussion of these particular rules clearly indicates that several commenters addressed this issue and that FERC considered the issue in depth. FERC also states that "there is an economic disincentive to use oil and natural gas." (Section-by-Section Analysis, 45 Federal Register No. 56 p. 17966) This observation is borne out by KCPL's evidence regarding cost of oil and natural gas. We see no reason to impose stricter limits.

This Commission is concerned that the standards set for cogenerators be adhered to. The utility with which the particular facility interconnects will have considerable contact with it, since it must install metering equipment and otherwise determine that interconnection is feasible. We, therefore, require the utilities to ascertain that cogenerators are in compliance with the fuel use standards. Any disagreement between a utility and a cogenerator will be resolved by the Commission on a case by case basis.

INTERCONNECTION COSTS

FERC has also prescribed rules regarding interconnection costs. The Kansas Parallel Generation Act K.S.A. 66-1,184 also addresses interconnection costs. In our previous order we relied on the state statute.

In this proceeding, the utilities have basically advanced the argument that all interconnection costs should be borne by the customer and that in addition, cogenerators and small power producers should pay a customer charge to pay for the cost of meter operation and maintenance. We specifically rejected this customer charge in our April 28 order. The evidence presented is not persuasive. The utility already has one meter on the premises, thus there is not an extra premise visit involved in reading a second meter. In addition since the customer pays for the meter, he would also pay for any cost of maintaining the meter. Assessing a customer charge and thus averaging the costs between facilities does not strike us as justified. It seems fair that each facility pay only the costs it incurs and we find that a customer charge is not appropriate.

The Coops testified that there was uncertainty regarding minimum metering requirements in our Order. We do not see any uncertainty; the order clearly states that two meters shall be used: one for purchases from utilities, and one for sales to utilities. We reject requiring a demand meter as recommended by the Coops. For these small facilities such a meter is too costly. The evidence presented on this issue on rehearing is not sufficient to cause us to alter the decision set out in our previous order.

IT IS THEREFORE BY THIS COMMISSION ORDERED THAT:

1. Jurisdiction over the parties and the subject matter is proper.

2. The capacity credit method applicable to generating utilities set out in the April 28, 1982, order shall be used in determining tariffs for facilities with a capacity of less than 100 KW.

3. Non-generating utilities shall pay the same capacity payment as their principal supplier.

4. The fuel use rules promulgated by FERC shall apply in Kansas.

5. The interconnecting utilities shall ascertain that cogeneration and small power production facilities conform to these rules.

6. With regard to interconnection costs our order of April 28, 1982, is affirmed.

7. Within sixty days from the date of this order all electric utilities shall file tariffs for purchases from cogenerators and small power producers with a capacity of less than 100 KW in accordance with our determination in this order and our April 28, 1982 order.

8. In all other respects our order of April 28, 1982, is affirmed.

Dated November 5, 1982.

Loux, Chmn.; Roy, Com.; Dick, Com.

/s/ Richard Riggs
Rick Riggs
Acting Executive Secretary

RR:EP:tmc
D:12

ORDER MAILED NOV 8 1982

APPENDIX E

(Entered December 1, 1982)

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners:

Richard C. (Pete) Loux, Chairman
Jane T. Roy
Phillip R. Dick

In the matter of a General Investigation to examine pricing of electric utility services as well as their load management and load control programs. (Cogeneration and Small Power Production)	)))))	Docket No. 115,379-U

ORDER ON APPLICATION FOR REHEARING

The above-referenced matters comes before the State Corporation Commission of the State of Kansas as a result of an application for rehearing by Kansas City Power and Light Co. (KCPL) of the Commission's order on rehearing of November 8, 1982. The Commission, being familiar with the record in this matter and fully advised in the premises finds and conclues that:

1. KCPL'S application for rehearing was properly filed in accordance with the requirements of K.S.A. 66-118b and K.A.R. 82-1-235.

2. KCPL seeks a rehearing for legal authorities relating to legal issues and the Commission's conclusions of law, KCPL alleges that the Commission is without lawful authority to order utilities to purchase power and energy from cogenerators and small power producers and

asserts that such an order deprives utilities of their property rights without due process in violation of the Fifth and Fourteenth Amendments. In its memorandum in support of the application KCPL specifically argues that such an order to purchase interferes with its freedom of contract. This argument is a repetition of that raised by KCPL in its previous application for rehearing on this issue. This Commission clearly stated in its order of June 18, 1982, that it would not inquire into the constitutionality of all State and Federal Laws directing it to perform certain actions. Even if this Commission were to decide that the laws which require it to make certain determinations regarding cogeneration and small power production were unconstitutional and therefore determined not to comply with requirements placed on it, KCPL would nevertheless be required by section 210 of the Public Utility Regulatory Policies Act to purchase power from these facilities. This Commission has no authority to declare federal laws unconstitutional and therefore inapplicable to public utilities in this state.

The State Parallel Generation Services Act specifically states:

> Every Public Utility which provides retail electric service in this state shall enter into a contract for parallel generation service with any person who is a customer at such utility . . . . for the purpose of feeding excess electrical power which is generated by such customer's energy producing system into the utility's system.

It is clear then that even absent any action by this Commission KCPL would be required to purchase electricity from customers producing power. This Commission has been given no power by the State Legislature to declare

state statutes unconstitutional. We therefore, again, refuse to rehear this issue.

3. KCPL also asserts that this Commission lacks jurisdiction to order public utilities to file tariffs for purchases from cogenerators and small power producers. In its memorandum of support KCPL contends that the Commission cannot assert jurisdiction under K.S.A. 66-1,185 which authorizes it to comply with PURPA and rules and regulations adopted pursuant thereto because the Commission chose to determine the capacity credit in a different manner than required by FERC rules. We do not agree. The mere fact that we deviated slightly from the FERC rules in determining the capacity credit does not invalidate our jurisdiction to require that purchase tariffs be filed. As KCPL points out this particular rule is also on appeal to the United States Supreme Court and is consequently not set in concrete at this time.

IT IS THEREFORE BY THIS COMMISSION ORDERED THAT: Kansas City Power and Light Co.'s application for rehearing be denied for the reasons set out above.

Dated: December 1, 1982

Loux, Chmn.; Roy, Com.; Dick, Com.

/s/ Richard Riggs
Acting Executive Secretary

ORDER MAILED DEC 2 1982

APPENDIX F

(Entered December 9, 1982)

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners:

Richard C. (Pete) Loux, Chairman
Jane T. Roy
Phillip R. Dick

In the matter of a General Investigation to examine pricing of electric utility services as well as their load management and load control programs. (Cogeneration and Emall Power Production.)	)))))	Docket No. 115,379-U

AMENDED ORDER ON REHEARING

On November 5, 1982, the Commission issued its Order on Rehearing. In this order the Commission determined that non-generating utilities pay the same capacity credit as their principal supplier to cogenerators and small power producers. The Commission also ordered the utilities to file tariffs within sixty days of the date of the order. In order to be able to file tariffs, the non-generating utilities need to receive information from their principal supplier as to the amount of capacity credit which should properly be included in their payment. Being fully advised in the premises the Commission finds and concludes that:

1. All generating utilities shall inform the non-generating utilities, for whom they are the principal supplier, in writing of their capacity credit as soon as it has been computed.

2. In order to permit non-generating utilities to establish appropriate procedures, these utilities will be given an additional thirty days in which to file tariffs beyond the sixty days set out in the order.

3. Each time that a generating utility alters its capacity credit it must notify the non-generating utilities, for which it is the principal supplier, no later than at the time that it files tariffs.

4. Non-generating utilities shall file new tariffs within twenty-one days after receipt of such information.

IT IS THEREFORE BY THIS COMMISSION ORDERED THAT:

1. Generating utilities shall notify non-generating utilities, for which they are the principal supplier, of the capacity credit to be paid to cogenerators and small power producers as set out in this order.

2. Non-generating utilities shall file purchase tariffs in conformance with this order.

3. The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

Dated: December 9, 1982

Loux, Chmn.; Roy, Com.; Dick, Com.

/s/ Richard Riggs
Acting Executive Secretary

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ORDER MAILED DEC 9 1982

APPENDIX G

(Filed May 12, 1983)

IN THE DISTRICT COURT OF
LINN COUNTY, KANSAS

KANSAS CITY POWER & LIGHT COMPANY, Applicant,	)	
v.	)	Case No. 82 C 98
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al., Respondents.	)	

JOURNAL ENTRY

Now, on this 12th day of May, 1983, there comes on for final determination, and formalization of the Journal Entry as to, the Application of Kansas City Power & Light Company ("Applicant") for judicial review of orders issued by The State Corporation Commission of the State of Kansas ("Commission") on April 28, 1982, June 18, 1982, November 5, 1982, December 1, 1982 and December 9, 1982, in a proceeding bearing Commission Docket No. 115,379-U. The Court (i) having carefully considered the pleadings, the briefs of the parties, the record on Applicant's Motion for Stay as to said orders, (ii) having heard the oral arguments of counsel on March 24, 1983, wherein there appeared for the Applicant Richard M. Smith and Warren B. Wood and for the Commission, et al. Robert M. Fillmore, Special Assistant Attorney General and Assistant General Counsel of the Commission, and Eva Power, Assistant General Counsel of the Commission,

and (iii) being well and duly advised in the premises, finds and concludes as follows:

1. The issues for determination are: (1) whether the Commission's cogeneration and small power production orders complained of by Applicant are violative of the Kansas and United States Constitutions' due process provisions and/or provisions against the taking of property without just compensation or for private use; (2) whether the Kansas Parallel Generation Services Act (K.S.A. 66-1,184), the Kansas Natural Gas Policy Act (K.S.A. 66-1,185), Section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §824a-3), and the Federal Energy Regulatory Commission's Small Power Production and Cogeneration Regulations (18 C.F.R. §§292.101 thru 292.602), or their application in the Commission's Orders, violate the Kansas and United States Constitutions' due process provisions and/or the provisions against the taking of private property without just compensation or for private use; (3) whether the Commission had jurisdiction and authority to issue the cogeneration and small power production orders complained of by Applicant; and (4) whether the Commission's cogeneration and small power production orders complained of by Applicant were unlawful, unreasonable, arbitrary or capricious.

2. The forerunner of cogeneration and small power production legislation was §210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §824a-3. Subsequent to the enactment of PURPA, the Federal Energy Regulatory Commission promulgated regulations implementing the Act, 18 C.F.R. §292.101 *et seq.*, the Kansas Legislature enacted the Parallel Generation Services Act, K.S.A. 66-1,184, and the Natural Gas Policy Act, K.S.A.

66-1,185, which carry out the intent of PURPA, and the Commission issued the cogeneration and small power production orders complained of by Applicant. Applicant's Motion for Stay as to said orders was denied by this Court on February 22, 1983, and such orders have been put into effect. Applicant claims that each, each combination of, and all of the aforementioned statutes, acts, regulations, and orders interfere with its freedom to contract or its freedom not to contract, deprive Applicant of its liberty and/or property without due process afforded by the United States and Kansas Constitutions, and take Applicant's property for private use or without just compensation in violation of the United States and Kansas Constitutions. Public utilities occupy a unique position in the American society, economy, and law and are subject to regulation in the public interest under the police power of both the federal and state government. Due to the compelling public interest with which public utilities are clothed, it is the judgment of the Court that the aforementioned statutes, acts, regulations, and orders were enacted, promulgated, and issued in the public interest, are reasonably related to federal and state energy objectives, and do not violate the due process guarantees or taking protections of the United States and Kansas Constitutions.

3. Applicant claims that the Commission was without statutory jurisdiction or authority under K.S.A. 66-110, 66-111, 66-1,184, or 66-1,185 or under any other section or statute in Aricle 66 to issue the cogeneration and small power production orders complained of. It is the judgment of the Court that the Commission did possess statutory jurisdiction and authority under K.S.A. 66-1,185 to issue the cogeneration and small power production orders here complained of because K.S.A. 66-1,185 authorizes the Com-

mission to implement PURPA and regulations promulgated pursuant thereto and, further, it is the judgment of the Court that such orders are lawful, reasonable and appropriate in the circumstances and should be sustained.

IT IS, THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED that the cogeneration and small power production orders of the Commission of which Applicant complains are lawful, reasonable and appropriate and are hereby sustained.

IT IS FURTHER BY THE COURT ORDERED that the Clerk of this Court shall transmit to the State Corporation Commission three certified copies of this Journal Entry in accordance with K.S.A. 66-118. In accordance with K.S.A. 60-258, the judgment of the Court shall be effective upon the date of filing of this Journal Entry with the Clerk of the District Court.

/s/ Leighton A. Fossey
Leighton A. Fossey
Associate District Judge

Approved As to Form:

Brian J. Moline
General Counsel

/s/ Robert M. Fillmore
Robert M. Fillmore
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Attorneys for Applicant

APPENDIX H

SUPREME COURT OF KANSAS

No. 55,844

KANSAS CITY POWER & LIGHT COMPANY,
Applicant-Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Richard C. (Pete) Loux, Chairman; Jane T. Roy and Phillip R. Dick, Commissioners; and their respective successors in Office as the constituent members of the State Corporation Commission of the State of Kansas,
Respondents-Appellees.

SYLLABUS BY THE COURT

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. § 824a-3 [1982]), and the regulations promulgated thereunder by the Federal Energy Regulatory Commission (FERC), have preempted the field in the area of cogeneration of electricity. The Kansas Corporation Commission, as a state regulatory agency, cannot require an electric utility to purchase electricity from a cogenerator at a rate greater than the federal regulated rate, which is based on the avoided cost to the utility, without first obtaining a waiver from FERC.

Appeal from Linn district court; LEIGHTON ARCHER FOSSEY, judge. Opinion filed February 18, 1984. Reversed.

Lowell L. Smithson, of Spencer, Fane, Britt & Browne, of Kansas City, Missouri, argued the cause, and *Gardiner*

B. Davis, of the same firm, *Richard M. Smith,* of Smith & Winter-Smith, of Mound City, and *Warren B. Wood,* of Kansas City, Missouri, were with him on the briefs for the appellant.

Robert M. Fillmore, special assistant attorney general and assistant general counsel, argued the cause, and *Brian J. Moline,* general counsel, and *Eva Powers,* assistant general counsel, were with him on the brief for the appellee.

The opinion of the court was delivered by

PRAGER, J.:

This is an appeal by the Kansas City Power and Light Company (KCPL) from orders of the Kansas Corporation Commission (KCC) fixing rates to be charged under contracts designed to promote the development of cogeneration and small power production electrical facilities. The district court upheld the orders of the KCC, and his appeal followed. The issues raised in the case are somewhat technical and require an interpretation of certain federal statutes and regulations and also certain Kansas statutes controlling the operations of the KCC.

In order to better understand the present controversy, it would be helpful at the outset to discuss the subject of cogeneration and its historical background. In 1978, the Congress of the United States was concerned about the energy crisis and the rapid increases in the cost of electricity. It concluded that a national energy program should be developed to encourage the cogeneration of electricity, which involves the combined production of electrical power and useful thermal energy, such as heat or steam. By producing heat and electricity in one process, fuel consumption can be reduced by as much as one-half. In the field of cogeneration, small power production

facilities are those which use biomass, waste, geothermal resources or renewable resources, such a wind, water, or solar energy, to produce electric power. In the course of this opinion, the term "cogenerator" will be used to refer to both cogenerators and small power producers.

In response to the energy crisis, the Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA) (Pub. L. No. 95-617). PURPA was enacted, in part, to remove three obstacles to cogeneration:

(1) Utilities were generally unwilling to purchase the power produced by cogenerators or at least to pay an appropriate rate;

(2) discriminatory high rates were sometimes changed for back-up service; and

(3) a cogenerator ran the risk of being considered a public utility and thus subject to state and federal regulations.

Congress designed Section 210 of PURPA (16 U.S.C. § 824a-3 [1982]) to remove these barriers to the development of cogeneration. PURPA required that electric utilities purchase electric energy from cogenerators and provide back-up power on a nondiscriminatory basis. Section 210 directed the Federal Energy Regulatory Commission (FERC) to prescribe rules to encourage cogeneration. Section 210 of PURPA further provided that the rates established by FERC for the purchase of electricity (1) shall be just and reasonable to the electric consumers of the electric utiilty and in the public interest; and (2) shall not discriminate against qualifying cogenerators or qualifying small power producers. It also provided, in substance, that no rule setting rates for purchases of electrical energy from cogeneration facilities "shall provide

for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." The term "incremental cost" is defined in the act as the cost to the electric utility of the electric energy which, but for the purchase from the cogenerator, such utility would generate or purchase from another source. Incremental cost is referred to as "avoided cost." PURPA also provided that each state regulatory authority shall, after notice and a public hearing, implement the rules promulgated by FERC. FERC is given the authority to enforce the requirements of PURPA against any state regulatory authority.

Pursuant to the authority granted by PURPA, FERC adopted rules and regulations pertaining to cogeneration and small power production, (18 C.F.R., Part 292 [1983]). These regulations required the rates for the purchase of electricity from federal qualifying cogeneration facilities to be based on "avoided cost," which is defined as the incremental cost which the utility would incur if it supplied the power itself or purchased it from another source. "Avoided cost" was thus established as the *maximum rate*. Regulation 18 C.F.R. § 292.304 (1983) provided that a rate for cogeneration purchases may be *less* than the avoided cost, if the state regulatory authority determines that a lower rate is consistent with the regulations and is sufficient to encourage cogeneration and small power production. Section 292.403 authorizes a state regulatory authority, after public notice, to apply to FERC for a waiver from the application of certain regulations. FERC is given the power to grant a waiver, if an applicant demonstrates that compliance with any requirements of the regulations is not necessary to encourage cogeneration and is not otherwise required under Section 210 of PURPA.

In 1979, the Kansas legislature, recognizing the need for energy conservation and cogeneration, responded to

PURPA by enacting K.S.A. 66-1,185 which gave the KCC such jurisdiction as is required to provide compliance with and carry out the requirements of PURPA and the rules and regulations adopted by FERC pursuant to the act. It directed the KCC to adopt such rules and regulations deemed necessary for such purpose including those needed for the establishment of necessary fees.

The 1979 Kansas legislature also enacted K.S.A. 66-1,184 which required every electric utility to enter into a contract for parallel generation service with a customer upon request of the customer. Under this statute, if the parties cannot agree on the terms of the contract, the KCC is given jurisdiction to settle any dispute. K.S.A. 66-1,184 has been referred to as the Parallel Generation statute. We, thus, have in Kansas statutes granting to the KCC authority to implement PURPA and the federal regulations and also to proceed independently under the Kansas Parallel Generation statute.

Following the enactment of PURPA and the adoption of the federal regulations, the constitutionality of PURPA was challenged in a federal district court in Mississippi. It found certain portions of PURPA, including Section 210, to be unconstitutional. That decision was appealed to the United States Supreme Court which reversed, holding that Section 210 of PURPA was within the power of Congress under the Commerce Clause of the United States Constitution. The court further held that Section 210 of PURPA did not trench on state sovereignty in violation of the Tenth Amendment *FERC v. Mississippi,* 456 U.S. 742, 72 L.Ed.2d 532, 102 S.Ct. 2126 (1982). The FERC full-avoided-cost and interconnection rules were also attacked in a petition filed in the United States Court of Appeals for the District of Columbia which held both rules

to be invalid. On *certiorari*, the United States Supreme Court reversed, holding that FERC did not act arbitrarily or capriciously in promulgating the full-avoided-cost rule or exceed its authority in promulgating the interconnection rule. *American Paper Inst. v. American Elec. Power*, 461 U.S. 402, 76 L.Ed.2d 22, 103 S.Ct. 1921 (1983).

American Paper Inst. is important in considering the issues in the present case, because, in the course of the opinion, Justice Marshall discusses the avoided-cost rule and the power of a state regulatory authority to depart from that rule in setting rates in cogeneration contracts. In the opinion, we find the following language:

> "It bears emphasizing that the full-avoided-cost rule is not as inflexible as might appear at first glance. First, any state regulatory authority and any nonregulated utility may apply to the Commission for a waiver of the rule. A waiver may be granted if the applicant demonstrates that a full-avoided-cost rate is unnecessary to encourage cogeneration and small power production. 18 CFR 292.403 (1982). Second, a qualifying facility and a utility may negotiate a contract setting a price that is lower than a full-avoided-cost rate. 18 CRF [*sic*] 202.301(b)(1) (1983). Because the full-avoided-cost rule is subject to revision by the Commission as it obtains experience with the effects of the rule, it may often be in the interest of a qualifying facility to negotiate a long-term contract at a lower rate. *The Commission's rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement.*" 76 L.Ed. 2d at 35. (Emphasis supplied.)

Simply stated, the United States Supreme Court has interpreted PURPA and the FERC regulations to mean that a state regulatory authority, in implementing PURPA

and the federal regulations, *must* apply the avoided-cost rule in the absence of a waiver granted by FERC or a specific contractual agreement setting a price that is lower than the avoided-cost rate.

On June 21, 1978, the KCC initiated an investigation of electric utilities pricing. On February 6, 1981, the KCC extended the investigation to include cogeneration and small power production. At the commission's direction, numerous public utilities including KCPL and other parties presented testimony at a hearing on this phase of the investigation. On April 28, 1982, the KCC issued its order on cogeneration and small power production as a result of those hearings. At the time the order was entered, the KCC had knowledge of *FERC v. Mississippi* challenging the constitutionality of PURPA, and *American Paper Inst. v. American Elec. Power,* which questioned the validity of the FERC regulations. The KCC stated in its order that it had decided to proceed with cogeneration in accordance with the Congressional intent expressed in PURPA, but would primarily rely on state law. The primary concern of the KCC at this hearing was to consider the rate to be paid to cogenerators for their power and the kind of data needed to determine those rates. The KCC, in its written order, recognized that, under FERC rules, the rate to be paid for cogeneration was to be based upon avoided cost. It stated, however, that it was impossible to determine a rate based upon avoided cost and refused to do so. It then proceeded to exercise its power under state law and determined rates on a different basis than avoided cost.

KCPL filed an application for rehearing, contending that the commission lacked jurisdiction to enter its original order and that the original order unconstitutionally deprived KCPL of its constitutional rights and property

rights. A rehearing was held, and on November 5, 1982, the KCC issued its order on rehearing which generally affirmed the commission's original order of April 1982, except for matters which are not of concern on this appeal. KCPL then brought this action in the district court of Linn County for a review of the orders of the KCC. On May 12, 1983, the district court entered judgment upholding the KCC orders as within the KCC's jurisdiction, as lawful and not arbitrary or capricious, and not contrary to the state or federal constitutions. KCPL filed a timely appeal to the appellate courts.

On the appeal, KCPL raises several issues. It contends (1) that the KCC in its order acted beyond its statutory authority; (2) that the KCC orders are unlawful, arbitrary, and capricious; (3) that the KCC violated the KCPL's freedom to contract under the state and federal constitutions; and (4) that the KCC's order results in a taking of KCPL's property without just compensation.

The record shows that, during the course of the proceedings before the KCC, counsel for the utility companies and the staff of the KCC were in agreement that cogenerators should be paid at a rate based upon a utility's avoided cost as provided in the FERC regulations. In the order on rehearing, the KCC noted that its own staff had argued in its brief that Congress has preempted inconsistent state action and, that, even if it had not, the FERC rules were appropriate and that the KCC should refrain from additional regulation on this issue. The KCC then adopted a position that it was not preempted from acting under the state statutes and that it could proceed to determine rates on a basis other than a utility's avoided cost. At the time these orders were made, the KCC did not have the guidance of the United States Supreme Court in *American Paper Inst. v. American Elec. Power,* which

is discussed above and which was not decided until May 16, 1983.

We have considered the record in the case and the briefs of counsel and have concluded that this case should be determined on the basis that the orders of the KCC setting rates for cogeneration not based on a utility's avoided cost were unlawful, since they were in violation of PURPA and the FERC regulations discussed above. We find that federal law has preempted the field in the area of cogeneration, and that the KCC, a state regulatory authority, cannot require KCPL to purchase electricity from cogenerators at a rate greater than the federal regulated rate based on avoided cost. The Congress of the United States established a national policy of developing alternate energy sources to combat the national energy crisis. The federal government has under its supervision activities in the energy field, including cogeneration, designed to benefit the nation as a whole. Where a state regulatory authority acts to the contrary, it must fail. The requirements of PURPA and the FERC regulations preclude or preempt state action not in compliance therewith unless a waiver is obtained. The FERC regulations (18 C.F.R. § 292.403 [1983]) provide for a federal waiver of the avoided-cost requirement. In this case, no waiver has been obtained from FERC by KCC. Here the KCC admits that the regulations established for cogeneration contracts provide for a rate which exceeds avoided cost. The KCC orders thus conflict and violate the federal statute and regulations, and hence are unlawful.

Since this case was argued on the appeal, counsel for KCPL has provided the court with a copy of *Consolidated Ed. Co. v. PSC,* 98 App. Div. 2d 377, 471 N.Y.S.2d 684 (1983), by the appellate division of the Supreme Court

of New York. That case holds, without equivocation, that PURPA and the federal regulations have preempted the area of cogeneration and that New York rules and regulations cannot lawfully require public utilities to purchase electricity from a cogenerator at a rate greater than a rate based upon avoided cost. The New York court relied in part on *American Paper Inst. v. American Elec. Power*, discussed above.

In view of our determination that the orders of the KCC are unlawful, since they violate the mandatory rate provisions of the federal statute and regulations, we do not deem it necessary to consider the other points raised by KCPL on the appeal. As noted above, in *FERC v. Mississippi*, PURPA and the FERC regulations issued thereunder were held to be within the power of Congress under the commerce clause and, further, that they do not trench on state sovereignty in violation of the Tenth Amendment. Since we have found that the challenged orders of the KCC are unlawful as a violation of federal law, that determines this case.

The judgment of the district court is reversed and the orders of the KCC are set aside as unlawful for the reasons stated in the opinion.

APPENDIX I

(Entered October 15, 1984)

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners:

Michael Lennen, Chairman
R. C. (Pete) Loux
Keith R. Henley

In the Matter of a General Investigation to Examine Pricing of Electric Utility Services, as Well as Their Load Management and Load Control Programs (Cogeneration and Small Power Production).	)))))	Docket No. 115,379-U

ORDER

The above-captioned matter comes before the State Corporation Commission of the State of Kansas for consideration and determination on its own Motion. Having reviewed its files and records and being duly advised in the premises, the Commission finds and concludes as follows:

1. By Order issued April 28, 1982, the Commission established rules concerning power produced by cogenerators and small power producers in the State of Kansas and rates to be paid to such cogenerators and small power producers by utilities. The Order required utilities to file tariffs for small facilities with a capacity of less than 100 kw. It left the larger facilities to contract with the utilities on a case-by-case basis for an appropriate rate. The Order determined that the payment to cogenerators and small power producers should consist of avoided energy

cost and a capacity credit. The Commission determined that the avoided energy cost should be calculated by including all costs which are used in determining the energy cost adjustment base for that utility, as well as the appropriate energy cost adjustment. For cooperatives, the Commission found that the energy component should be "the energy component in the wholesale rates from those utilities." With regard to the capacity credit, the Commission found that full avoided costs, as defined in FERC rules, was not appropriate. The Commission believed, however, that an incentive payment for capacity was appropriate, and determined that the capacity payment to cogenerators and small power producers should be "50 percent of the per unit authorized rate of return on the utility's net production plant, as determined in the utility's latest rate case." Electric cooperatives were to pay 50 percent of the capacity component of their wholesale rates.

2. Kansas City Power & Light Company (KCPL) and 34 rural electric cooperatives filed applications for rehearing of certain issues determined in the Commission's April 28, 1982 Order. Rehearing was granted with regard to certain issues. In its Order on rehearing, distibution utilities were ordered to pay the same capacity credit as the utility from which it purchased power.

3. Kansas City Power & Light Company appealed the Commission's decision to court. The Commission was upheld by the Linn County District Court. By agreement between the Commission and KCPL, the matter was removed to the Supreme Court of Kansas. The Kansas Supreme Court determined that federal law had preempted the field in the area of cogeneration and that the Kansas Corporation Commission could not require Kansas City Power & Light to purchase electricity from cogenerators

at a rate greater than the federally established rate, which is based upon avoided cost. The court further stated that the KCC admitted in its Order that the rate established exceeded avoided cost. The court, therefore, found the Commission's decision to be unlawful.

4. After receiving the decision by the Supreme Court, the Commission re-examined the record established in the original proceeding before it. The Commission determined that the evidence presented at that time was sufficient for making a decision in conformance with the Supreme Court's Order.

5. The Supreme Court relied on the Commission's language that, "Kansas electric utilities have surplus capacity at this time and for the foreseeable future," in determining that the payment to cogenerators and small power producers exceeded avoided cost. Thus, it is the capacity credit that was found to be beyond avoided cost. The Commission, therefore, finds that a capacity credit shall not, as a matter of course, be included in the purchase tariff. Clearly, this determination is only be applicable to utilities which, in fact, are in an excess capacity situation; and at such time as any utility becomes in need of additional capacity, this determination would no longer apply. If it can be determined that a utility, in fact, can avoid capacity costs by purchasing power from a cogenerator or small power producer, clearly, a capacity payment shall be made. Utilities which purchase most of their power would seem to fall in this category. The Commission believes that it is appropriate to continue to permit facilities with a capacity of more than 100 kw to negotiate with utilities on an individual basis. As before, the Commission retains complaint jurisdiction over such cases. A new tariff must, however, be filed for fa-

cilities with a capacity of less than 100 kw. All jurisdictional electric utilities are, therefore, ordered to file new tariffs for purchases from cogenerators and small power producers with the capacity of less than 100 kw. Such tariffs shall include the fuel component as determined in the Commission's April 28, 1982 Order. The tariff shall also include a provision that would permit payment by a time-differentiated rate, provided the particular cogenerator or small power producer desires to purchase a time-differentiated meter. In addition, the tariff should indicate that if it can be demonstrated that capacity cost can be avoided by the utility, a capacity payment shall be negotiated between the parties.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT: All jurisdictional electric utilities shall file new tariffs for purchases from cogenerators and small power producers with a capacity of less than 100 kw. Such tariffs shall reflect full avoided fuel cost, as well as other information as stated above. The Commission retains jurisdiction over the parties and the subject matter for the purpose of issuing such further Order or Orders as it may deem necessary.

Lennen, Chmn.; Loux, Com.; Henley, Com.

Dated: October 15, 1984

/s/ Judith McConnell
Judith McConnell
Executive Secretary

SEAL
EP/jlmE.P.

ORDER MAILED OCT 15 1984

APPENDIX J

(Entered November 2, 1984)

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners:

Michael Lennen, Chairman
Richard C. (Pete) Loux
Keith R. Henley

In the Matter of a General Investigation to Examine Pricing of Electric Utility Services As Well As Their Load Management and Load Control Programs (Cogeneration and Small Power Production).	)))))	Docket No. 115,379-U

ORDER DENYING APPLICATION FOR REHEARING

The above-captioned matter comes before the State Corporation Commission of the State of Kansas as a result of an Application for Rehearing of the Commission's October 15, 1984 Order concerning cogeneration and small power production. The Commission, being familiar with the record in this matter and fully advised in the premises, finds and concludes as follows:

1. Kansas City Power & Light Company's (KCP&L's) Application for Rehearing was properly filed on October 23, 1984, in accordance and compliance with the various provisions of K.S.A. 66-118b and K.A.R. 82-1-235.

2. KCP&L seeks a rehearing for the purpose of presenting legal authorities relating to the constitutional validity of the Commission's October 15, 1984 Order and of

the Kansas and federal statutes and regulations upon which the Order is based. Specifically, KCP&L asserts that the Commission's Order and the statutes and regulations upon which it is based: (1) take KCP&L property for the benefit of private parties without just compensation; (2) unconstitutionally deprive KCP&L of the freedom of contract; and (3) unconditionally deprive KCP&L of Liberty and property without due process of law. Additionally, KCP&L asserts that if the Order is unconstitutional, then "the order of necessity is arbitrary, capricious, unreasonable, unlawful, and illegal."

3. KCP&L's arguments constitute a repetition of arguments made in its previous Application for Rehearing which resulted in an appeal to the Linn County District Court in Case No. 82-C-98, and to the Kansas Supreme Court in Case No. 83-55844-S. For the reasons set forth in the Commission's legal briefs in the Linn County District Court proceeding and the Kansas Supreme Court proceeding above referenced, the Commission believes that KCP&L's constitutional arguments are without merit.

4. The Commission, having re-examined its Order dated October 15, 1984, finds no error in its Order, and specifically reaffirms all findings of fact and conclusions of law therein contained and concludes that its Order should be reaffirmed and KCP&L's Application for Rehearing denied without further hearing.

IT IS, THEREFORE, BY 'THE COMMISSION ORDERED THAT: KCP&L's Application for Rehearing of the Commission's Order of October 15, 1984 in the above-captioned matter be, and the same is, hereby denied.

Dated: NOVEMBER 2, 1984

Lennen, Chmn.; Loux, Com.; Henley, Com.

/s/ Judith McConnell
Judith McConnell
Executive Secretary

SEAL
JLM

ORDER MAILED NOV 2 1984

APPENDIX K

(Filed May 31, 1985)

IN THE DISTRICT COURT OF
LINN COUNTY, KANSAS

KANSAS CITY POWER & LIGHT COMPANY, Applicant,

vs. No. 84 C 67

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al., Respondents.

MEMORANDUM DECISION

This matter is before the Court on the application of Kansas City Power and Light Company (KCP&L) for a review of an order of the Kansas Corporation Commission (KCC) dated October 15, 1984.

Extensive briefs have been filed by the parties; oral arguments have been presented; the Court has carefully considered the briefs of the parties and the cases cited therein; and now makes and files this Memorandum Decision.

A previous order of the Commission was before this Court in Case No. 82 C 98, upon an application for review of an order of KCC under date of April 28, 1982. At that time, arguments were made concerning the constitutionality of both Federal statutes and regulations, and Kansas Statutes and regulations. The Court, on May 12, 1983, entered judgment upholding the KCC orders as within its jurisdiction, lawful, not arbitrary or capricious, and not contrary to State or Federal Constitutions. KCP&L filed an appeal and the matter was ultimately heard by the Supreme Court of the State of Kansas.

The background of the controversy existing here is well set out in the opinion of the Kansas Supreme Court in the case of *Kansas City Power & Light Company v. Kansas Corporation Commission,* 234 Kan. 1052, 676 P.2d 764, which was the appeal from the judgment of this Court. For that reason, the Court feels that it is not necessary to review or repeat the background information set out therein.

In the interim between the entering of the Order of this Court on May 12, 1983, and the hearing of the appeal in the Supreme Court of the State of Kansas, the case of *American Paper Inst. v. American Electric Power,* 461 U.S. 402, 76 L.ed. 2d 22, 103 Supreme Court 1921 (1983) was heard and decided. Until the decision in that case, the term "avoided-cost rule" set out in regulations of the Federal Energy Regulatory Commission (FERC) was not entirely clear. In that case, however, the full-avoided-cost rule was clarified in the opinion written by Justice Marshall. That case was called to the attention of the Kansas Supreme Court, which determined that the rate set for the purchase of cogenerated power by KCC was unlawful, and this Court was reversed and the KCC order involved in that case was set aside as unlawful.

Following the decision in that case, KCC, on its own motion, determined that sufficient evidence was before the Commission for the issuance of a new order in compliance with the ruling of the Kansas Supreme Court in *KCP&L v. KCC, supra.* That order was made and entered under date of October 15, 1984. Applications were made for rehearing, which said applications were denied. KCP&L has again filed in this Court an application for review. No question has been presented to the Court concerning the timeliness of any of the actions, and the Court finds that the arguments presented by KCP&L are essentially

those argued to this Court in the previous case, 82 C 98. The Court is aware, as were KCC & KCP&L, of the decision of the United States Supreme Court in the case of *FERC v. Mississippi,* 456 U.S. 742, in which the constitutionality of the Public Utility Regulatory Policies Act of 1978 (PURPA) was challenged under the Commerce Clause of the United States Constitution. The Supreme Court of the United States, in that case, held the act to be constitutional and within the power of Congress under the Commerce Clause of the United States Constitution. The Court further held that Section 210 of PURPA did not fringe on State sovereignty in violation of the Tenth Amendment.

Applicant contends that PURPA, FERC, K.S.A. 66-110, 111, 1,184, and 1,185, and any orders of the Commission issued pursuant thereto, are unconstitutional, unlawful, illegal, arbitrary, unreasonable, and capricious because the order, and any statutes and regulations upon which it is based, (1) unconstitutionally take applicant's property for the benefit of private parties without just compensation, (2) unconstitutionally deprive applicant of the freedom of contract, and (3) unconstitutionally deprive applicant of liberty and of property without due process of law in violation of the Fifth and the Fourteenth Amendments to the Constitution of the United States, and in violation of Sections 1, 2, and 18 of the Bill of Rights of the Constitution of the State of Kansas.

No case has been cited to this Court by either KCP&L or KCC, nor has the Court been able to find any, in which the specific constitutional questions herein argued have been presented to or decided by a Court in connection with PURPA, FERC, and the Kansas Statutes relating to cogeneration and small power producers. KCP&L has provided to the Court in its brief and oral arguments,

many cases relating to unconstitutional taking, but the Court finds that the factual basis of all such cases cited by KCP&L, can be distinguished from the situation at hand. At the time of the enactment of PURPA, this nation faced a grave crisis. The act was passed by Congress for a specific public benefit in the National interest in the conservation of energy sources. Public utilities occupy a unique position in our society, and are subject to regulation in the public interest under the police power of both the Federal and the State Governments. PURPA and FERC have been held to be constitutional under the Commerce Clause of the U.S. Constitution. If the full-avoided-cost rule is strictly applied, then the utility, which is required to purchase power from cogenerators or parallel generators, should not suffer any financial loss. It is true that they would be required to allow other individuals to come upon their property, that is easements, for the purpose of making connections with their lines for the sale to KCP&L of excess power generated by them. Due, however, to the compelling National interest in the conservation of energy and the position occupied in our society by public utilities, the Court finds that the statutes, acts, regulations, and orders involved in this case were enacted, promulgated, and issued in the public interest, that they are reasonably related to Federal and State energy objectives, and by reason of extreme public interest, are not violative of the taking or due process provisions of the United States and Kansas Constitutions.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the Order of the Commission issued October 5, 1984, is lawful, reasonable, and does not violate taking or due process provisions of either the Federal or Kansas Constitutions, and said Order is hereby sustained.

IT IS FURTHER BY THE COURT ORDERED that the Clerk of this Court shall transmit to the State Corporation Commission, three certified copies of this Memorandum Decision in accordance with K.S.A. 66-118.

This Memorandum Decision shall serve as Journal Entry herein, and be effective upon filing with the Clerk of the District Court.

Dated this 31st day of May, 1985.

/s/ Leighton A. Fossey
Leighton A. Fossey
Associate District Judge

Copies mailed to counsel
of record this 31st day of
May, 1985.

APPENDIX L

(Filed March 28, 1986)

IN THE SUPREME COURT OF THE STATE OF KANSAS

KANSAS CITY POWER & LIGHT COMPANY,	)	
Appellant,	)	
v.	)	No. 85-58293-AS
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,	)	
Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Kansas City Power & Light Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the Memorandum Decision entered May 31, 1985 by the District Court of Linn County. The decision and judgment of the Supreme Court of the State of Kansas were entered on February 21, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

Spencer, Fane, Britt & Browne
/s/ Charles S. Schnider/GBD
Charles S. Schnider
40 Corporate Woods, Suite 500
9401 Indian Creek Parkway
P. O. Box 25407
Overland Park, Kansas 66225
(913) 345-8100

/s/ Lowell L. Smithson
Lowell L. Smithson
/s/ Gardiner B. Davis
Gardiner B. Davis
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100
/s/ Warren B. Wood
Warren B. Wood
Kansas City Power & Light Co.
8730 Nieman Road
Overland Park, Kansas 66214
(913) 888-0326
Attorneys for Appellant

CERTIFICATE OF SERVICE
and
NOTARIZED STATEMENT OF FILING

The undersigned, counsel of record for Appellant Kansas City Power & Light Company, hereby avers and states that to the best of his knowledge an appropriate number of copies of the "Notice of Appeal to the Supreme Court of the United States" were deposited in the United States Mail in Kansas City, Missouri, on the 25th day of March, 1986, with first class postage prepaid and properly addressed to the Clerk of the Supreme Court of Kansas, Clerk of the District Court, Linn County, Kansas and the counsel of record for each party separately represented, all within the time and in the manner permitted for such filings by Supreme Court Rules, addressed as follows:

Mr. Lewis C. Carter
Clerk of the Court
Supreme Court of Kansas
Kansas Judicial Center
Topeka, Kansas 66612

Ms. Ann Stuart
Clerk of the Court
Linn County District Court
315 Main Street
P. O. Box B
Mound City, Kansas 66056

Brian J. Moline, Esq.
General Counsel
State Corporation Commission
4th Floor, State Office Building
Topeka, Kansas 66612

Warren E. Baker, Esq.
4200 Somerset, Suite 210
Prairie Village, Kansas 66208

Thomas W. Porter, Esq.
Erickson & Hall
3320 Harrison
Topeka, Kansas 66611

/s/ Lowell L. Smithson
Lowell L. Smithson

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Subscribed and sworn to before me, in my presence, this 25th day of March, 1986, a Notary Public in and for the State of Missouri.

/s/ Susan J. Clay
Notary Public

My Commission Expires:
January 20, 1990

APPENDIX M

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

16 U.S.C. §§ 796, 824a-3, 824i, 824k, 2601 (1982) (codifying Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§ 201, 210, 202, 204(a), 2, 92 Stat. 3117 (1978)):

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal

under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons

or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest

in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) "small power production facility" means a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy.

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility—

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(18)(A) "cogeneration facility" means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility which—

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

(19) "Federal power marketing agency" means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) "evidentiary hearings" and "evidentiary proceeding" mean a proceeding conducted as provided in sections 554, 556, and 557 of Title 5;

(21) "State regulatory authority" has the same meaning as the term "State commission", except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) "electric utility" means any person or State agency which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

* * *

§ 824a-3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

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1. So in original. Probably should be followed by a comma.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments,

prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section.

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k]

or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal

Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section[2] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

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2. So in original. Probably should be followed by a comma.

(j) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. 796(17), (18)].

* * *

§ 824i. Interconnection authority

(a) Powers of Commission; application by State regulatory authority

(1) Upon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer, the Commission may issue an order requiring—

(A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant,

(B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability,

(C) such sale or exchange of electric energy or other coordination, as may be necessary to carry out the purposes of any order under subparagraph (A) or (B), or

(D) such increase in transmission capacity as may be necessary to carry out the purposes of any order under subparagraph (A) or (B).

(2) Any State regulatory authority may apply to the Commission for an order for any action referred to in subparagraph (A), (B), (C), or (D) of paragraph (1). No such order may be issued by the Commission with respect to a Federal power marketing agency upon application of a State regulatory authority.

(b) Notice, hearing and determination by Commission

Upon receipt of an application under subsection (a) of this section, the Commission shall—

(1) issue notice to each affected State regulatory authority, each affected electric utility, each affected Federal power marketing agency, each affected owner or operator of a cogeneration facility or of a small power production facility, and to the public.[1]

(2) afford an opportunity for an evidentiary hearing, and

(3) make a determination with respect to the matters referred to in subsection (c) of this section.

(c) Necessary findings

No order may be issued by the Commission under subsection (a) of this section unless the Commission determines that such order—

(1) is in the public interest,

(2) would—

(A) encourage overall conservation of energy or capital,

(B) optimize the efficiency of use of facilities and resources, or

(C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and

(3) meets the requirements of section 824k of this title.

(d) Motion of Commission

The Commission may, on its own motion, after compliance with the requirements of paragraphs (1) and (2) of subsection (b) of this section, issue an order requiring any action described in subsection (a)(1) of this section if the Commission determines that such order meets the requirements of subsection (c) of this section. No such order may be issued upon the Commission's own motion with respect to a Federal power marketing agency.

(e) Definitions

(1) As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

(2) With respect to an order issued pursuant to an application of a qualifying cogenerator or qualifying small power producer under subsection (a)(1) of this section, the term "facilities of such applicant" means the qualifying cogeneration facilities or qualifying small power production facilities of the applicant, as specified in the application. With respect to an order issued pursuant to an application under subsection (a)(2) of this section, the term "facilities of such applicant" means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilites of an elec-

tric utility, as specified in the application. With respect to an order issued by the Commission on its own motion under subsection (d) of this section, such term means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilities of an electric utility, as specified in the proposed order.

* * *

§ 824k. Orders requiring interconnection or wheeling

(a) Determinations by Commission

No order may be issued by the Commission under section 824i of this title or subsection (a) or (b) of section 824j of this title unless the Commission determines that such order—

(1) is not likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(2) will not place an undue burden on an electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(3) will not unreasonably impair the reliability of any electric utility affected by the order; and

(4) will not impair the ability of any electric utility affected by the order to render adequate service to its customers.

The determination under paragraph (1) shall be based upon a showing of the parties. The Commission shall have no authority under section 824i or 824j of this title to compel the enlargement of generating facilities.

(b) Reimbursement of parties subject to orders

No order may be issued under section 824i of this title or subsection (a) or (b) of section 824j of this title unless the applicant for such order demonstrates that he is ready, willing, and able to reimburse the party subject to such order for—

(1) in the case of an order under section 824i of this title, such party's share of the reasonably anticipated costs incurred under such order, and

(2) in the case of an order under subsection (a) or (b) of section 824j of this title—

(A) the reasonable costs of transmission services, including the costs of any enlargement of transmission facilities, and

(B) a reasonable rate of return on such costs, as appropriate, as determined by the Commission.

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the

Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2) (A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial

If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Utilization of interconnection or wheeling authority in lieu of other authority; limitation of Commission authority

No provision of section 824i or 824j of this title shall be treated—

(1) as requiring any person to utilize the authority of such section 824i or 824j of this title in lieu of any other authority of law, or

(2) as limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law.

(f) Effective date of order; hearing; notice; review

(1) No order under section 824i or 824j of this title requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 824i or of section 824j of this title requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n-4), hereinafter in this subsection referred to as the TVA Act [16 U.S.C. 831 et seq.].

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 824i or 824j of this title until whichever of the following dates is applicable—

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n-4(a)]) takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 824i or 824j of this title, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 824i or section 824j of this title requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n-4(a)].

* * *

§ 2601. Findings

The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require—

(1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers,

(2) a program to improve the wholesale distribution of electric energy, the reliability of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission, and to provide other measures with respect to the regulation of the wholesale sale of electric energy,

(3) a program to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power,

(4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable,

(5) a program to encourage the development of crude oil transportation systems, and

(6) the establishment of certain other authorities as provided in title VI of this Act.

Kan. Stat. Ann. §§ 66-1,184 to 66-1,185 (1985):

66-1,184. Contracts for parallel generation services between electric utilities and its customers; terms and conditions; duties of customer. Every public utility which provides retail electric services in this state shall enter into a contract for parallel generation service with any person who is a customer of such utility, upon request of such customer, whereby such customer may attach or connect to the utility's delivery and metering system an apparatus or device for the purpose of feeding excess electrical power which is generated by such customer's energy producing system into the utility's system. No such apparatus or device shall either cause damage to the public utility's system or equipment or present an

undue hazard to utility personnel. Every such contract shall include, but need not be limited to, provisions relating to fair and equitable compensation on such customer's monthly bill for energy supplied to the utility by such customer, and the following terms and conditions: (a) The utility will supply, own, and maintain all necessary meters and associated equipment utilized for billing. In addition, and for the purposes of monitoring customer generation and load, the utility may install at its expense, load research metering. The customer shall supply, at no expense to the utility, a suitable location for meters and associated equipment used for billing and for load research; (b) for the purposes of insuring the safety and quality of utility system power, the utility shall have the right to require the customer, at certain times and as electrical operating conditions warrant, to limit the production of electrical energy from the generating facility to an amount no greater than the load at the customer's facility of which the generating facility is a part; (c) the customer shall furnish, install, operate, and maintain in good order and repair and without cost to the utility, such relays, locks and seals, breakers, automatic synchronizer, and other control and protective apparatus as shall be designated by the utility as being required as suitable for the operation of the generator in parallel with the utility's system. In any case where the customer and the utility cannot agree to terms and conditions of any such contract, the state corporation commission shall establish the terms and conditions for such contract. In addition, the utility may install, own, and maintain a disconnecting device located near the electric meter or meters. Interconnection facilities between the customer's and the utility's equipment shall be accessible at all reasonable times to utility personnel. The customer may be required

to reimburse the utility for any equipment or facilities required as a result of the installation by the customer of generation in parallel with the utility's service. The customer shall notify the utility prior to the initial energizing and start-up testing of the customer-owned generator, and the utility shall have the right to have a representative present at such test; and (d) the utility may require a special agreement for conditions related to technical and safety aspects of parallel generation.

Service under any such contract shall be subject to the utility's rules and regulations on file with the state corporation commission.

66-1,185. Jurisdiction of commission to comply with certain federal legislation. (a) The state corporation commission shall have such jurisdiction as is required to provide compliance with and carry out the requirements of the provisions of the federal natural gas policy act of 1978 and the provisions of the public utility regulatory policies act of 1978 and with the rules and regulations adopted by federal agencies pursuant to such acts, and the state corporation commission shall adopt such rules and regulations deemed necessary for such purpose including those needed for the establishment of necessary fees.

(b) The state corporation commission may apply for, receive and disburse any federal funds made available to state regulatory agencies to provide compliance with such acts.

18 C.F.R. §§ 292.101-.602 (1985):

§ 292.101 Definitions.

(a) *General rule.* Terms defined in the Public Utility Regulatory Policies Act of 1978 (PURPA) shall have the same meaning for purposes of this part as they have under PURPA, unless further defined in this part.

(b) *Definitions.* The following definitions apply for purposes of this part.

(1) "Qualifying facility" means a cogeneration facility or a small power production facility which is a qualifying facility under Subpart B of this part of the Commission's regulations.

(2) "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(3) "Sale" means the sale of electric energy or capacity or both by an electric utility to a qualifying facility.

(4) "System emergency" means a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.

(5) "Rate" means any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and any contract pertaining to the sale or purchase of electric energy or capacity.

(6) "Avoided costs" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility

or qualifying facilities, such utility would generate itself or purchase from another source.

(7) "Interconnection costs" means the reasonable costs of connection, switching, metering, transmission, distribution, safety provisions and administrative costs incurred by the electric utility directly related to the installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility, to the extent such costs are in excess of the corresponding costs which the electric utility would have incurred if it had not engaged in interconnected operations, but instead generated an equivalent amount of electric energy itself or purchased an equivalent amount of electric energy or capacity from other sources. Interconnection costs do not include any costs included in the calculation of avoided costs.

(8) "Supplementary power" means electric energy or capacity supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(9) "Back-up power" means electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.

(10) "Interruptible power" means electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions.

(11) "Maintenance power" means electric energy or capacity supplied by an electric utility during scheduled outages of the qualifying facility.

§ 292.201 Scope.

This subpart applies to the criteria for and manner of becoming a qualifying small power production facility and a qualifying cogeneration facility under sections 3(17)(C) and 3(18)(B), respectively, of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

§ 292.202 Definitions.

For purposes of this subpart:

(a) "Biomass" means any organic material not derived from fossil fuels;

(b) "Waste" means by-product materials other than biomass;

(c) "Cogeneration facility" means equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy;

(d) "Topping-cycle cogeneration facility" means a cogeneration facility in which the energy input to the facility is first used to produce useful power output, and the reject heat from power production is then used to provide useful thermal energy;

(e) "Bottoming-cycle cogeneration facility" means a cogeneration facility in which the energy input to the system is first applied to a useful thermal energy process, and the reject heat emerging from the process is then used for power production;

(f) "Supplementary firing" means an energy input to the cogeneration facility used only in the thermal pro-

cess of a topping-cycle cogeneration facility, or only in the electric generating process of a bottoming-cycle cogeneration facility;

(g) "Useful power output" of a cogeneration facility means the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process;

(h) "Useful thermal energy output" of a topping-cycle cogeneration facility means the thermal energy made available for use in any industrial or commercial process, or used in any heating or cooling application;

(i) "Total energy output" of a topping-cycle cogeneration facility is the sum of the useful power output and useful thermal energy output;

(j) "Total energy input" means the total energy of all forms supplied from external sources;

(k) "Natural gas" means either natural gas unmixed, or any mixture of natural gas and artificial gas;

(l) "Oil" means crude oil, residual fuel oil, natural gas liquids, or any refined petroleum products; and

(m) Energy input in the case of energy in the form of natural gas or oil is to be measured by the lower heating value of the natural gas or oil.

(n) "Electric utility holding company" means a holding company, as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7) which owns one or more electric utilities, as defined in section 2(a)(3) of that Act, 15 U.S.C. 79b (a)(3), but does not include any holding company which is exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Hold-

ing Company Act of 1935, 15 U.S.C. 79c(a)(3) or 79c (a)(5).

(o) "Utility geothermal small power production facility" means a small power production facility which uses geothermal energy as the primary energy resource and of which more than 50 percent is owned either:

(1) By an electric utility or utilities, electric utility holding company or companies, or any combination thereof.

(2) By any company 50 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote by an electric utility, electric utility holding company, or any combination thereof.

§ 292.203 General requirements for qualification.

(a) *Small power production facilities.* A small power production facility is a qualifying facility if it:

(1) Meets the maximum size criteria specified in § 292.204(a);

(2) Meets the fuel use criteria specified in § 292.204 (b); and

(3) Meets the ownership criteria specified in § 292.206.

(b) *Cogeneration facilities.* (1) A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it:

(i) Meets any applicable operating and efficiency standards specified in § 292.205 (a) and (b); and

(ii) Meets the ownership criteria specified in § 292.206.

(2) For purposes of qualification of a cogeneration facility for exemption from incremental pricing, a cogeneration facility must qualify under § 292.205(c).

§ 292.204 Criteria for qualifying small power production facilities.

(a) *Size of the facility*—(1) *Maximum size.* The power production capacity of the facility for which qualification is sought, together with the capacity of any other facilities which use the same energy resource, are owned by the same person, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.* (i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if they use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.

(3) *Waiver.* The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(b) *Fuel use.* (1) (i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas, and coal by a facility may not, in the aggregate, exceed 25 percent of the total energy input of the facility during any calendar year period.

§ 292.205 Criteria for qualifying cogeneration facilities.

(a) *Operating and efficiency standards for topping-cycle facilities*—(1) *Operating standard.* For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must, during any calendar year period, be no less than 5 percent of the total energy output.

(2) *Efficiency standard.* (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during any calendar year period, must:

(A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or

(B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

(b) *Efficiency standards for bottoming-cycle facilities.* (1) For any bottoming-cycle cogeneration facility for

which any of the energy input as supplementary firing is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility must, during any calendar year period, be no less than 45 percent of the energy input of natural gas and oil for supplementary firing.

(2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) *Exemption from incremental pricing.* (1) Natural gas used in any topping-cycle cogeneration facility is eligible for an exemption from incremental pricing under Title II of the Natural Gas Policy Act of 1978 (NGPA) and Part 282 of the Commission's rules if:

(i) The facility meets the operating and efficiency standards under paragraphs (a)(1) and (2)(i) of this section and is a qualifying facility under § 292.203(b)(1); or

(ii) The facility is a qualifying facility under Subpart E of this part.

(2) Natural gas used in any bottoming-cycle cogeneration facility, not subject to an exemption from incremental pricing under Subpart E of this part, is eligible for an exemption under Title II of the NGPA and Part 282 of the Commission's rules to the extent that reject heat emerging from the useful thermal energy process is made available for use for power production.

(3) Nothing in this subpart affects any exemption provided under Subpart E of this part.

(4) Natural gas used for supplementary firing in any cogeneration facility is not eligible under this part for exemption from incremental pricing.

(d) *Waiver.* The Commission may waive any of the requirements of paragraphs (a), (b) and (c) of this section upon a showing that the facility will produce significant energy savings.

§ 292.206 Ownership criteria.

(a) *General rule.* A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities.)

(b) *Ownership test.* For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric holding company.

(c) *Exceptions.* For purposes of this section a company shall not be considered to be an "electric utility" company if it:

(1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3), 79c(a)(5); or

(2) It is declared not to be an electric utility company by rule or order of the Securities and Exchange Commis-

sion pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3)(A).

§ 292.207 Procedures for obtaining qualifying status.

(a) *Qualification.* (1) A small power production facility or cogeneration facility which meets the criteria for qualification set forth in § 292.203 is a qualifying facility.

(2) The owner or operator of any facility qualifying under this paragraph shall furnish notice to the Commission providing the information set forth in paragraphs (b)(2)(i) through (iv) of this section.

(b) *Optional procedure*—(1) *Application for Commission certification.* Pursuant to the provisions of this paragraph, the owner or operator of the facility may file with this Commission an application for Commission certification that the facility is a qualifying facility.

(2) *General contents of application.* The application shall contain the following information:

(i) The name and address of the applicant and location of the facility;

(ii) A brief description of the facility, including a statement indicating whether such facility is a small power production facility or a cogeneration facility;

(iii) The primary energy source used or to be used by the facility;

(iv) The power production capacity of the facility; and

(v) The percentage of ownership by any electric utility or by any electric utility holding company, or by any person owned by either.

(3) *Additional application requirements for small power production facilities.* An application by a small power producer for Commission certification shall contain the following additional information:

(i) The location of the facility in relation to any other small power production facilities located within one mile of the facility, owned by the applicant which use the same energy source; and

(ii) Information identifying any planned usage of natural gas, oil or coal.

(4) *Additional application requirements for cogeneration facilities.* An application by a cogenerator for Commission certification shall contain the following additional information:

(i) A description of the cogeneration system, including whether the facility is a topping or bottoming cycle and sufficient information to determine that any applicable requirements under § 292.205 will be met; and

(ii) The date installation of the facility began or will begin.

(5) *Commission action.* Within 90 days of the filing of an application, the Commission shall issue an order granting or denying the application, tolling the time for issuance of an order, or setting the matter for hearing. Any order denying certification shall identify the specific requirements which were not met. If no order is issued within 90 days of the filing of the complete application, it shall be deemed to have been granted.

(6) *Notice.* (i) Applications for certification filed under this paragraph shall include a copy of a notice of the request for certification for publication in the FEDERAL REGISTER. The notice shall state the applicant's name, the

date of the application, and a brief description of the facility for which qualification is sought. This description shall include:

(A) A statement indicating whether such facility is a small power production facility or a cogeneration facility;

(B) The primary energy source used or to be used by the facility;

(C) The power production capacity of the facility; and

(D) The location of the facility.

(ii) The notice shall be in the following form:

(Name of Applicant)

Docket No. QF–

NOTICE OF APPLICATION FOR COMMISSION CERTIFICATION OF QUALIFYING STATUS OF A (SMALL POWER PRODUCTION) (COGENERATION) FACILITY

On (date application was filed), (name and address of applicant) filed with the Federal Energy Regulatory Commission an application to be certified as a qualifying (small power production) (cogeneration) facility pursuant to § 292.207 of the Commission's rules.

[Brief description of the facility].

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with §§385.209 and 385.214 of this chapter. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be

considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

(c) *Notice requirements for facilities of 500 kW or more.* An electric utility is not required to purchase electric energy from a facility with a design capacity of 500 kW or more until 90 days after the facility notifies the utility that it is a qualifying facility, or 90 days after the facility has applied to the Commission under paragraph (b) of this section.

(d) *Revocation of qualifying status.* (1) The Commission may revoke the qualifying status of a qualifying facility which has been certified under this section if such facility fails to comply with any of the statements contained in its application for Commission certification.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status.

§ 292.301 Scope.

(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) *Negotiated rates or terms.* Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase,

or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

§ 292.302 Availability of electric utility system cost data.

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, paragraph (b) applies to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(2) Each utility having total sales of electric energy for purposes other than resale of less than one billion kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding year, shall not be subject to the provisions of this section until June 30, 1982.

(b) *General rule.* To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component,

for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

(c) *Special rule for small electric utilities.* (1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(i) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the electric utility) or the Commission for an order requiring that the information be provided.

(d) *Substitution of alternative method.* (1) After public notice in the area served by the electric utility, and after opportunity for public comment, any State regulatory authority may require (with respect to any electric utility over which it has ratemaking authority), or any non-regulated electric utility may provide, data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data.

(2) Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated utility which requires such different data shall notify the Commission within 30 days of making such determination.

(e) *State Review.* (1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.

§ 292.303 Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility.

(c) *Obligation to interconnect.* (1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under Part II of the Federal Power Act.

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(e) *Parallel operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

§ 292.304 Rates for purchases.

(a) *Rates for purchases.* (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, "new capacity" means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has rate-making authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) *Standard rates for purchases.* (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be

based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(e) *Factors affecting rates for purchases.* In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

(1) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(i) The ability of the utility to dispatch the qualifying facility;

(ii) The expected or demonstrated reliability of the qualifying facility;

(iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation:

(vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

(f) *Periods during which purchases not required.* (1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying

facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence.

§ 292.305 Rates for sales.

(a) *General rules.* (1) Rates for sales:

(i) Shall be just and reasonable and in the public interest; and

(ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.

(2) Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.

(b) *Additional Services to be Provided to Qualifying Facilities.* (1) Upon request of a qualifying facility, each electric utility shall provide:

(i) Supplementary power;

(ii) Back-up power;

(iii) Maintenance power; and

(iv) Interruptible power.

(2) The State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and the Commission (with respect to any nonregulated electric utility) may waive any requirement of paragraph (b)(1) of this section if, after notice in the area served by the electric utility and after opportunity for public comment, the electric utility demonstrates and the State regulatory authority or the Commission, as the case may be, finds that compliance with such requirement will:

(i) Impair the electric utility's ability to render adequate service to its customers; or

(ii) Place an undue burden on the electric utility.

(c) *Rates for sales of back-up and maintenance power.* The rate for sales of back-up power or maintenance power:

(1) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and

(2) Shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

§ 292.306 Interconnection costs.

(a) *Obligation to pay.* Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or non-

regulated electric utility may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.

(b) *Reimbursement of interconnection costs.* Each State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and nonregulated utility shall determine the manner for payments of interconnection costs, which may include reimbursement over a reasonable period of time.

§ 292.307 System emergencies.

(a) *Qualifying facility obligation to provide power during system emergencies.* A qualifying facility shall be required to provide energy or capacity to an electric utility during a system emergency only to the extent:

(1) Provided by agreement between such qualifying facility and electric utility; or

(2) Ordered under section 202(c) of the Federal Power Act.

(b) *Discontinuance of purchases and sales during system emergencies.* During any system emergency, an electric utility may discontinue:

(1) Purchases from a qualifying facility if such purchases would contribute to such emergency; and

(2) Sales to a qualifying facility, provided that such discontinuance is on a nondiscriminatory basis.

§ 292.308 Standards for operating reliability.

Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may establish reasonable standards to ensure system safety and reliability of inter-

connected operations. Such standards may be recommended by any electric utility, any qualifying facility, or any other person. If any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility establishes such standards, it shall specify the need for such standards on the basis of system safety and reliability.

§ 292.401 Implementation by State regulatory authorities and nonregulated electric utilities.

(a) *State regulatory authorities.* Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence impementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

(b) *Nonregulated electric utilities.* Not later than one year after these rules take effect, each nonregulated electric utility shall, after notice and an opportunity for public hearing, commence implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to comply with Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

(c) *Reporting requirement.* Not later than one year after these rules take effect, each State regulatory authority and nonregulated electric utility shall file with the Commission a report describing the manner in which it will implement Subpart C (other than § 292.302 thereof).

§ 292.402 Implementation of certain reporting requirements.

Any electric utility which fails to comply with the requirements of § 292.302(b) shall be subject to the same penalties to which it may be subjected for failure to comply with the requirements of the Commission's regulations issued under section 133 of PURPA.

§ 292.403 Waivers.

(a) *State regulatory authority and nonregulated electric utility waivers.* Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may, after public notice in the area served by the electric utility, apply for a waiver from the application of any of the requirements of Subpart C (other than § 292.302 thereof).

(b) *Commission action.* The Commission will grant such a waiver only if an applicant under paragraph (a) of this section demonstrates that compliance with any of the requirements of Subpart C is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA.

§ 292.501 Scope.

This subpart defines qualifying cogeneration facilities for the sole purpose of establishing an interim exemption from incremental pricing under the Natural Gas Policy Act of 1978.

§ 292.502 Qualifying requirements for cogeneration facilities.

(a) *Definition of qualifying cogeneration facility.* For purposes of Title II of the Natural Gas Policy Act of

1978 (NGPA), and Subpart B of Part 282 of the Commission's rules, the term "qualifying cogeneration facility" means a cogeneration facility which:

(1) Was in existence on November 1, 1979;

(2) Used natural gas as a fuel on or prior to that date;

(3) Produces electric energy and another form of useful energy (such as heat or steam), used for industrial, commercial, heating or cooling purposes, through the sequential use of energy; and

(4) Meets the efficiency standards set forth in this section.

(b) *Definitions.* For purposes of this subpart:

(1) "Cogeneration facility" means equipment used to produce electric energy and another form of useful energy (such as heat or steam), used for industrial, commercial heating or cooling purposes, through the sequential use of energy;

(2) "Useful thermal energy output" of a cogeneration facility means the heat made available for use in an industrial process or for use as space or water heating;

(3) "Useful power output" of a cogeneration facility means the electrical or mechanical energy made available for use, exclusive of any used solely in the power production process;

(4) "Total energy input" means the total energy of all forms supplied from external sources to the cogeneration facility. In the case of energy in the form of fossil fuel, the energy input is to be measured by the lower heating value of such fuel;

(5) "Working fluid energy input" to a cogeneration facility means the enthalpy of steam leaving a boiler minus that of the feed water, when the steam is subsequently used in a topping cycle;

(6) "Overall energy efficiency" means the ratio of the sum of all useful thermal and power outputs to the total energy input of the cogeneration facility, measured by means of actual data or estimates. Any energy used exclusively in the thermal process of a topping-cycle (supplementary firing) facility shall not be included as energy output or energy input for the purpose of determining the cogeneration facility's overall energy efficiency;

(7) "Internal energy efficiency" means the ratio of the sum of all useful thermal and power outputs to the working fluid energy input, measured by means of actual data or estimates. Any energy used exclusively in the thermal process of a topping-cycle (supplementary firing) facility shall not be included as energy output or energy input for the purpose of determining the cogeneration facility's internal energy efficiency;

(8) A "topping-cycle cogeneration facility" means a cogeneration facility in which the energy input to the facility is first used to produce power, and the waste heat from power production is then used to provide useful heat;

(9) A "bottoming-cycle cogeneration facility" means a cogeneration facility in which the energy input to the system is first applied to a useful heating process, and the residual heat emerging from the process is used then for power production; and

(10) "Supplementary firing" means natural gas used only in the thermal process of a topping-cycle cogenera-

tion facility, or only in the electric generating process of a bottoming-cycle cogeneration facility.

(c) *Efficiency standards for topping-cycle facilities.* For topping-cycle cogeneration facilities using natural gas, with or without any other fuels, the following efficiency standard applies:

(1) The facility's overall energy efficiency must be not less than 0.55, or

(2) The internal energy efficiency of the facility must be not less than 0.70.

(d) *Efficiency standards for bottoming-cycle facilities.* For bottoming-cycle cogeneration facilities, there is no efficiency standard for qualification.

(e) *Eligibility.* In order to obtain qualifying status under the interim rule, a cogeneration facility must:

(1) Have been in existence on November 1, 1979, and

(2) Have used natural gas as an energy input on or prior to November 1, 1979.

(f) *Waiver.* The Commission may waive any of the provisions of this subpart if it determines that such waiver is necessary to encourage cogeneration.

(g) *Limitations of benefits of interim qualification.* Obtaining qualifying status for purpose of this interim rule does not:

(1) Constitute qualifying status for purposes of section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), or

(2) Assure that a facility will be a qualifying facility under the Commission's final rules implementing section 201 of PURPA or Title II of the NGPA.

§ 292.503 Procedures for obtaining qualifying status.

(a) In order to be a qualifying facility for purposes of exemption from incremental pricing, a facility must meet the standards set forth in § 292.502.

(b) If a cogeneration facility meets the standards set forth in § 292.502, the owner or operator of the facility may file an executed exemption affidavit that the facility is a qualifying cogeneration facility, pursuant to the procedures set forth in § 282.204 of the Commission's rules.

§ 292.601 Exemption to qualifying facilities from the Federal Power Act.

(a) *Applicability.* This section applies to qualifying facilities, other than those described in paragraph (b) of this section.

(b) *Exclusion.* This section does not apply to a qualifying small power production facility with a power production capacity which exceeds 30 megawatts, if such facility uses any primary energy source other than geothermal resources.

(c) *General rule.* Any qualifying facility described in paragraph (a) of this section shall be exempt from all sections of the Federal Power Act, except:

(1) Section 1-18, and 21-30;

(2) Sections 202(c), 210, 211, and 212;

(3) Sections 305(c); and

(4) Any necessary enforcement provision of Part III with regard to the sections listed in paragraphs (c)(1), (2) and (3) of this section.

§ 292.602 Exemption to qualifying facilities from the Public Utility Holding Company Act and Certain State law and regulation.

(a) *Applicability.* This section applies to any qualifying facility described in § 292.601(a), and to any qualifying small power production facility with a power production capacity over 30 megawatts if such facility produces electric energy solely by the use of biomass as a primary energy source.

(b) *Exemption from the Public Utility Holding Company Act of 1935.* A qualifying facility described in paragraph (a) of this section or a utility geothermal small power production facility shall not be considered to be an "electric utility company" as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3).

(c) *Exemption from certain State law and regulation.* (1) Any qualifying facility shall be exempted (except as provided in paragraph (c)(2)) of this section from State law or regulation respecting:

(i) The rates of electric utilities; and

(ii) The financial and organizational regulations of electric utilities.

(2) A qualifying facility may not be exempted from State law and regulation implementing Subpart C.

(3) Upon request of a State regulatory authority or nonregulated electric utility, the Commission may consider a limitation on the exemptions specified in paragraph (c)(1) of this section.

(4) Upon request of any person, the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation.

APPENDIX N

(Filed June 20, 1985)

IN THE DISTRICT COURT OF LINN COUNTY, KANSAS

KANSAS CITY POWER & LIGHT COMPANY, Applicant
No. 84 C 67
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al., Respondents.

TRANSCRIPT

Proceedings had before the HONORABLE LEIGHTON A. FOSSEY, Associate District Judge of the Sixth Judicial District, at Mound City, Kansas, April 18, 1985.

APPEARANCES

Applicant appears by and through Richard M. Smith, Mound City, Kansas; Lowell Smithson and Warren Wood, Overland Park, Kansas, its attorneys.

Respondents appear by and through their attorneys, Robert M. Fillmore, Eva Powers, and Mary Ann Neath, Topeka, Kansas.

* * *

[61] THE COURT: Well, my question, suppose a fellow decided to set up a windmill field. Does your regulation contemplate that they would be required to purchase energy from him. Not a previous customer. He set it up solely for the purpose of selling electricity.

MR. FILLMORE: The answer to that, I believe, is no. If that particular person is not within the service territory of the utility and a customer of the utility, the utility has no obligation to purchase cogenerated energy from them—that person.

THE COURT: Well, that was a question that occurred to me because I do know in some areas of the country, that is being done.

MR. FILLMORE: Perhaps Eva Powers can better answer that particular question than I can for you.

MS. POWERS: I think I can respond to that rather briefly. If you could have a situation where you had somebody who wanted to set up a windmill or a wind farm and sell power to the utility. If that particular arrangement, wind farm, facility, whatever, is within the facility service territory, then the utility would be obligated to purchase power from that particular entity, even though it may not be purchasing power from the utility.

THE COURT: Whether they were a customer or not?

MS. POWERS: Yes, that could happen.

[62] THE COURT: Okay, that was the question that I had.

MR. FILLMORE: Sorry for the misunderstanding on my part.

* * *

[70] CERTIFICATE

I, Jean R. Mayhugh, transcriber for the Linn County District Court in the 6th Judicial District of the State of Kansas, do hereby certify that the within and preceeding transcript contains all the evidence requested to be transcribed by me, and the rulings of the Court thereon,

from the proceedings had in or at the trial of the foregoing cause in said court; that said transcript is a correct and complete transcription of the evidence requested to be transcribed from the official tape recording made at the time of the proceedings or trial, as indicated by the files and records of this court; that the cost of said transcript is $105.00.

(Computation: 70 pages at $1.50 per page.)

Dated this 19th day of June, 1985.

/s/ Jean R. Mayhugh
Jean R. Mayhugh
Transcriptionist

I, Leighton A. Fossey, Associate District Judge for the District Court of Linn County District Court in the 6th Judicial District of the State of Kansas, do hereby state that the tape recording from which this complete transcript was prepared is the official record made at the time of the proceedings had in or at the trial of the foregoing cause in said court; and that said tape recording constituting the official record has been at all times in the custody and under the control of the Linn County District Court.

Dated this 19th day of June, 1985.

/s/ Leighton A. Fossey
Leighton A. Fossey
Associate District Judge

APPENDIX O

(Filed October 23, 1984)

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In The Matter Of A General Investigation To Examine Pricing Of Electric Utility Services As Well As Their Load Management And Load Control Programs (Cogeneration and Small Power Production).	)	Docket No. 115,379-U

MEMORANDUM AND SUGGESTIONS IN SUPPORT OF KANSAS CITY POWER & LIGHT COMPANY'S APPLICATION FOR REHEARING

Comes now Kansas City Power & Light Company ("KCPL"), Applicant, and submits this memorandum and and suggestions of legal authorities in support of its Application For Rehearing filed on October 23, 1984.

POINT I

The Commission's Order, And The Statutes And Regulations On Which It Is Based, Unconstitutionally Take Applicant's Property For The Benefit Of Private Parties And Without Just Compensation, In Violation Of The Fifth Amendment Of The United States Constitution (Made Applicable To States By The Fourteenth Amendment Of The United States Constitution) And In Violation Of Sections 1,2 and 18 Of The Kansas Bill Of Rights, By Forcing Applicant To Surrender To Private Parties

(Cogenerators) Payments For Unreliable Power Applicant Does Not Want Or Need, By Forcing Applicant Without Just Compensation To Surrender To Such Private Parties Physical Access To And Physical Connections With Applicant's Transmission And Distribution Network, By Forcing Applicant Without Compensation To Surrender To Such Private Parties Physical Use Of And To Suffer Physical Intrusion Into Applicant's Transmission Network, By Forcing Applicant To Surrender Without Compensation To Such Private Parties The Right To Enter Applicant's Property Or Easement Areas To Make Physical Interconnection With Applicant's Transmission And Distribution Network, And By Causing Applicant Without Just Compensation To Idle Or Forego The Use Of Its Own Capacity And Property.

The Fifth Amendment precludes Government from taking private property for public use without just compensation; its terms apply against the States through incorporation into the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 160 (1980). Sections 1, 2 and 18 of the Kansas Bill Of Rights have likewise been held to preclude the taking of property without just compensation. *Chamberlain v. Missouri P. Ry.*, 107 Kan. 341, 344, 191 P. 261, 263 (1920). A corollary of this rule precludes the taking of property for the benefit of a private person. *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937). The Commission's Order here, and the statutes and regulations on which the Commission seeks to base the Order,[1] constitute or effect precisely such forbidden takings for the benefit of private persons, the cogenerators.

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1. Public Utility Regulatory Policies Act ("PURPA") § 210, 16 U.S.C. § 824a-3; 18 C.F.R. §§ 292.101-602; and K.S.A. 66-111, 66-1,184, 66-1,185.

In short, Applicant's property may not be taken for private use at all—whether with or without just compensation—and Applicant's property may not be taken for public use without just compensation. The Order, and the statutes and regulations on which the Order is supposedly based, thus unconstitutionally effect takings as follows:

1. By forcing the Applicant to pay its money, which is property, to private parties, cogenerators. for unreliable, nonfirm power Applicant does not want or need—thus taking private property in the form of money and transferring it to a private party. The unreliable, nonfirm, non-peak power is of no value whatever to the Applicant, is not needed or wanted by the Applicant, and is not just compensation for the money thus taken from Applicant. The money taken is given to private parties, the cogenerators, becomes the property of the private parties, and may be spent as desired by and for the sole benefit of the private parties. Such money is not the property of the public and may not be used by the public.

2. The Order forces Applicant without any compensation whatsoever to surrender to such private party, the cogenerator, the right of physical access to and the right of physical connection with Applicant's transmission and distribution network. The Order, and the statutes and the regulations upon which it is based, thus take from the Applicant and vest in the private party the right to physical access to and the right to make physical connection with Applicant's transmission and distribution network—thus taking from Applicant and vesting in the private party such rights for the benefit of such private party and without any compensation therefor whatsoever.

3. The Order, and the statutes and regulations on which the Order is based, force the Applicant without any compensation whatsoever to surrender to such private parties the physical use of, and to suffer physical intrusion of power into, the transmission and distribution system of the Applicant—a physical use and taking for the benefit of the private parties and without any compensation whatsoever therefor to the Applicant.

4. The Order, and the statutes and the regulations on which the Order is based, take from the Applicant and vest in the private party the right as may be necessary to enter the property or easement areas of the Applicant to make physical interconnections between the systems of the cogenerators and the system of the Applicant—all without any compensation whatsoever therefor and for the benefit of the private party.

5. The Order, and the statutes and the regulations on which the Order is based, also take from the Applicant its right to use its own electrical capacity—without any compensation whatsoever. The Applicant thus must back down its own ample generating capacity and allow room in its transmission and distribution system for the physical intrusion therein of the power of the private party.

As to each of these takings, it is manifest that the takings are for a private party and without compensation. Each alone is a flagrant constitutional violation. Once a taking is found for a private party or without compensation, the Order, statutes and regulations fall as constitutionally invalid without regard to any supposed public interest to be served. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982).

Moreover, as the United States Supreme Court recently reaffirmed, one of the most fundamental property rights protected under the Fifth Amendment is the right to exclude others from the use of one's property. *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80 (1979). The Orders, statutes and regulations at issue here deprive Applicant of precisely this right: By administrative fiat, the Commission has appropriated for the benefit of private parties the right to use transmission, distribution, and marketing facilities that were developed by Applicant at great expense and further has caused Applicant to forego use of its own ample generating capacity. (*See* April 28, 1983 Order pp. 11-12). Such an infringement of Applicant's property rights violates the guarantees afforded by the Fifth and Fourteenth Amendments and by Sections 1, 2, and 18 of the Kansas Bill Of Rights.

A strikingly similar administrative order was considered by the United States Supreme Court in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937). In that action, the Texas Railroad Commission had issued orders that had the effect of requiring Texas pipeline owners to purchase gas from well owners who lacked access to gas pipelines, notwithstanding the fact that the production capacity of the pipeline owners' own wells far exceeded their market demand. *Id.* at 58, 60. Noting that "[t]he plaintiffs and other pipeline owners acquired, at large cost, their markets in distant States and their transportation and marketing facilities," *id.* at 66, a unanimous Supreme Court struck down the Order in question, affirming a lower court ruling that "[t]he necessary operation and effect of such orders is to take from complainant and others similarly situated substantial and valuable interests in their private marketing contracts and commitments and in the use of their pipelines and other

facilities for transmitting their gas to their markets, without compensation, and to confer same upon the owners of the approximately 180 sweet gas wells in the field not connected to pipelines." *Id.* at 78. Writing for this unanimous Court, Justice Brandeis agreed with this conclusion:

> The use of the pipe line owner's wells and reserves is curtailed solely for the benefit of the other private well owners. The pipe line owner, a private person, is, in effect, ordered to pay money to another private well owner for the purchase of oil which there is no wish to buy. . . .
>
> The order disables the plaintiffs from performing their contracts except by means of purchases. Resort to those means necessarily results in depriving the plaintiffs of property. Under each statute, if obeyed, the State takes from the pipe line owner the money with which the purchase is made, the money lost through curtailed use of properties developed at large expense, money lost because of the drainage away from his land of the gas which he is forbidden to produce for himself, but must buy from those towards whose lands it migrates.
>
> *Our law reports present nor more glaring instance of the taking of one man's property and giving it to another.*

Id. at 78-79 (emphasis added). Precisely as in the *Thompson* situation, the Order, statutes and regulations under consideration here require Applicant, against its will, to purchase power that Applicant's own ample generating facilities are capable of producing. Further, Applicant has in effect been ordered to make available to private parties, without compensation from the private

congenerator, the marketing and distribution facilities that Applicant has developed at great expense over a period of decades. Finally, the Applicant has in effect been forced to forego the use of Applicant's own generating facilities without compensation therefor from the private party benefited. As Justice Brandeis ruled in *Thompson*, such a taking of property for the benefit of a private person is constitutionally impermissible.

Moreover, as Justice Holmes has written in a similar case, even a valid public purpose for such an action does not cure the constitutional infirmity:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

POINT II

The Order, And The Statutes And Regulations On Which The Order Is Based, By Forcing Applicant To Purchase Electrical Power From Third Parties And Thus Making A Contract For Two Parties Against The Will Of One, The Applicant, Unconstitutionally Deprive Applicant Of The Freedom Of Contract In Violation Of Applicant's Rights Under The Fifth And Fourteenth Amendments To The United States Constitution And Under Section One Of The Bill Of Rights Of The Kansas Constitution.

The Order, and the statutes and regulations upon which it is based,[2] are constitutionally invalid for the rea-

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2. Public Utility Regulatory Policies Act ("PURPA") § 210, 16 U.S.C. § 824a-3; 18 C.F.R. §§ 292.101-602; and K.S.A. 66-111, 66-1,184, 66-1,185.

son that they infringe on Applicant's freedom of contract as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Section One of the Kansas Bill of Rights.

It cannot be disputed that freedom of contract is a liberty interest that is protected under the Fifth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Manhattan Buildings, Inc. v. Hurley,* 231 Kan. 20, 28, 643 P.2d 87, 95 (1982). This liberty interest is likewise protected under Section 1 of the Kansas Bill of Rights. *Coffeyville Vitrified Brick & Tile Co. v. Perry,* 69 Kan. 297, 301, 76 P. 848, 849 (1904). Among the elements of this constitutionally protected right is the freedom to exercise one's own independent discretion as to the parties with whom one enters into business relations. *Reeves, Inc. v. Stake,* 447 U.S. 429, 438-39 (1980); *Coffeyville Vitrified Brick & Tile Co. v. Perry,* 69 Kan. 297, 301, 76 P. 848, 849 (1904). While the freedom of contract is subject to the right of Government to place reasonable regulations on the performance of contracts once they are freely negotiated and existing, *Highland v. Russell Car & Snowplow Co.,* 279 U.S. 253, 261 (1929), it is a far different matter for Government to affirmatively impose a contract upon an involuntary party. The Commission's Order in this action, by directing Applicant to submit tariffs for the purchase of unneeded power, and then forcing Applicant to purchase this power at Commission-mandated rates, has the effect of establishing the parties, subject matter, and pricing of a contract and the further effect of requiring Applicant, against its will, to agree and to perform. Such sweeping intrusion into Applicant's freedom, business decisions, and property is constitutionally impermissible:

> [The Legislature] may do many things with reference to contracts, but it cannot make a contract between parties, because a contract implies volition and the agreement of two or more minds to one and the same thing; in other words, consent. The Legislature can no more make a contract for parties without their consent, than it can take away a vested right, or impair the obligation of a contract already made.

Stephen v. Hicks, 156 N.C. 239, 72 S.E. 313, 316 (1911). Further, the Order in effect forces the Applicant to enter into purchase contracts with cogenerators with capacity of more than 100 Kw.[3] The liberty interest protected by the Federal Constitution also includes the right to *decline* to enter into a contract. *Califano v. Travelers Ins. Co.,* 63 Misc. 2d 296, 311 N.Y.S.2d 401, 403 (Sup. Ct. 1970); *see Shaitelman v. Phoenix Mut. Life Ins. Co.,* 517 F. Supp. 21, 25 (S.D.N.Y. 1980). The Commission's Order, and the statutes and regulations on which it is based, unconstitutionally infringe upon this right.

Applicant's constitutional right to be free of government-imposed purchases is not diminished by its status as an investor-owned public utility. While its public utility status requires Applicant to offer electrical power for sale in its service area, this obligation does not compromise Applicant's constitutional right to be free of imposed obligations that are not a practical and vital part of Ap-

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3. The Commission clearly seeks by the Order of October 15, 1984, to republish and redeclare the April 28, 1983 and November 5, 1983 Orders vacated by the Kansas Supreme Court in 1984 in Appeal No. 83-55844-S. The April 28 Order directly ordered the Applicant and other utilities to so contract based in part on K.S.A. 66-1,184 and K.S.A. 66-1,185 (See April 28 Order, p. 15, November 5 Order, p. 7). Further, the Order (p. 3) retains jurisdiction for the Commission to force upon the Applicant contracts to buy energy from cogenerators with capacity of 100 Kw and above.

plicant's traditional duty to sell and provide electrical service. As one court noted in a similar situation, when a legislative body sought to require a utility to provide light bulbs to its electrical customers:

> The city council can no more compel a public service corporation to do or abstain from doing anything not pertaining to the public service itself than it can compel a private individual; for, outside of its public functions, *the corporation is a private corporation.* . . .
>
> No one can seriously assert that the furnishing of incandescent lamps is a part of the public duty of a quasi public corporation supplying electricity for light or power. No law of the state attempts in the remotest extent to impose such a duty. *The public duty of such a corporation is fully performed when it has brought its commodity safely and conveniently to the door of the consumer.* Within that door the company is not by law obliged, and may not by law be compelled, to go for any purpose foreign to the public service it is called upon to render, and that the purpose here contemplated is foreign is abundantly established . . . . So that, aside from the fact that the execution of this criminal ordinance would work an unconstitutional confiscation of property, a fact itself conclusive against the validity of the ordinance, it attempts by law to impose upon a public service corporation a burden and a duty in no wise appertaining to or growing out of its public functions.

Ex parte Goodrich, 160 Cal. 410, 117 P. 451, 456 (1911) (en banc) (emphasis supplied); *accord, Delaware, L. & W.R.R. v. Town of Morristown*, 276 U.S. 182, 194 (1928) (striking down ordinance requiring public railroads to provide hack stands for railroad passengers). See also *Great*

Northern Railway Co. v. Minnesota, 238 U.S. 340, 346 (1915) (no authority to order railway company to erect scales for use by railway shippers); *Classified Directory Subscribers Ass'n v. Public Service Comm'n*, 383 F.2d 510, 512 (D.C. Cir. 1967) (no authority to regulate "Yellow Pages" advertising, as such is not a "service" provided by the utility and thus subject to Commission jurisdiction).

Because the purchase obligations that the Commission's Order and related statutes and regulations attempt to impose go beyond the traditional duty to *sell* and provide electrical power, the Order, statutes and regulations unconstitutionally infringe on Applicant's freedom of contract. The Applicant has never held itself out to the public to provide transmission and distribution service as a common carrier—nor ever held itself out to the general public to buy power. Rather, the Applicant has only held itself out in the traditional way to sell and provide its electric power to the public. The Order, and the statutes and regulations upon which the Order is based, should be held thus constitutionally invalid. The Order should be vacated.

POINT III

The Order, And The Statutes And Regulations On Which The Order Is Based, Unconstitutionally Deprive The Applicant Of Liberty And Property Without Due Process Of Law Contrary To The Fifth And Fourteenth Amendments To The United States Constitution And Contrary To Section One Of The Bill Of Rights Of The Kansas Constitution, Because They Do Not Provide Reasonable Means Of Attaining Any Legitimate Legislative End, In That The Means They Provide Are Themselves Unconstitutional And Otherwise Unreasonable Or Arbitrary. The

Means They Provide Effect Unconstitutional Takings Of Applicant's Property For The Benefit Of Private Parties And Without Just Compensation And Unconstitutionally Deprive Applicant Of The Freedom Of Contract. The Means They Provide Are Otherwise Unreasonable Or Arbitrary In Forcing Applicant To Enter Contracts With Private Parties To Buy An Unreliable Product Applicant Does Need Or Want, By Specifying Both The Terms Of The Contract And The Parties Thereto, By Forcing The Applicant To Give The Use Of Its Transmission And Marketing System To Private Parties Without Compensation, By Forcing The Applicant Without Compensation Whatsoever To Idle Applicant's Own Capacity Or Not Use Applicant's Own Property, And By Forcing Applicant And The Other Electric Utilities In Kansas To Forego Burning Coal While Allowing Cogenerators To Burn Oil And Natural Gas To Create The Energy Applicant Must Buy—Thus Conflicting With And Not Attaining The End Of PURPA And Any Other Statute On Which The Commission Seeks To Base The Order.

Substantive due process violations occur under the Fifth and Fourteenth Amendments to the United States Constitution when federal and state action, respectively, do not constitute a reasonable means of attaining a legitimate objective in the public interest. The Order, and the statutes and regulations upon which the Order is based, are not reasonable means of attaining the PURPA objective or any legitimate objective in the public interest. The PURPA and FERC Rules' objective was articulated in a similar case by the Supreme Court of Florida: "The ultimate goal of the statute and the rules was to reduce this country's dependence on foreign oil." *Florida Power & Light Co. v. Florida Pub. Serv. Comm'n,* No. 60, 671, slip op. (Fla. March 17, 1983). Put another way, the corollary end

of PURPA was to move electric generation away from gas and oil resources and toward the greatest use of coal. *See* H. Rep. No. 95-543, 95th Cong. 2nd Sess. at 8, *reprinted in* [1978] U.S. Code Cong. & Admin. News at 7677. The Order, and the statutes and regulations upon which the order is based,[4] do not constitute lawful or reasonable means of attaining the end of PURPA and the FERC regulations. The reasons such means are unlawful and unreasonable, both generally and as applied to Applicant, follow.

First, the Order and such statutes and regulations unconstitutionally take Applicant's property for the benefit of private persons and without just compensation—all as stated in Point I above and here incorporated by reference. *An unconstitutional means of attaining the end of PURPA can hardly be ruled a reasonable means of attaining the end.* The end does not justify the means in either law or philosophy. Thus under traditional substantive due process standards, the Order and its related statutes and regulations must fall as violating the due process clauses of the Fifth Amendment of the United States Constitution (thus voiding the federal statute and regulations and the Order) and the Fourteenth Amendment of the United States Constitution and Section One of the Kansas Bill of Rights (thus voiding the Kansas statutes and the Order).

Second, the Order and the statutes and regulations are unconstitutional means of attaining the end as they deprive the Applicant of the liberty of contract—all as stated in Point II above and here incorporated by reference. Again, unconstitutional means are not a reasonable means of

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4. Public Utility Regulatory Policies Act ("PURPA") § 210, 16 U.S.C. § 824a-3; 18 C.F.R. §§ 291.101-602; and K.S.A. 66-111, 66-1,184, 66-1,185.

attaining any legitimate end. Thus under substantive due process standards, the Order and its related statutes and regulations must fall (in the manner just noted in paragraph "First") under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and under Section One of the Bill of Rights of the Kansas Constitution.

Third, the evidence before the Commission showed that Applicant (and other Kansas utilities) burns coal to generate approximately 96% of the electric energy.[5] Cogenerators, however, burn and are allowed to burn oil and gas. The effect of the Order is to force the Applicant (and other Kansas electric utilities) (i) to back down on the firing of coal to create electric energy and (ii) to accept cogenerator electric energy produced from the burning of oil and gas. Both effects of the Order, as applied to Applicant and to other electric utilities in Kansas, are in conflict with and not a reasonable means of attaining the end of conserving oil and gas and burning coal for electric energy. Thus, the confusion and conflict between the means adopted and the end sought—forthrightly considered—demonstrate substantive due process violations, both generally and as applied to Applicant (and other Kansas utilities). The Order hence must fall.

POINT IV

The United States Supreme Court And The Kansas Supreme Court Have Not Previously Decided The Foregoing Constitutional Challenges To PURPA, The FERC Regulations And The Kansas Statutes.

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5. In 1981, 96.1% of the fuel used by KCPL for electricity generation was coal. (R. Vol. III, Trans. of 8/18/82 Hearing, at 80). Cogenerators may well rely on oil or natural gas. (*Id.* at 233).

The Kansas Supreme Court in ruling in favor of the Applicant and setting aside the earlier cogeneration orders of the Commission (the April 28, 1983 and November 5, 1983 Orders herein) as unlawful in *Kansas City Power & Light Company v. State Corporation Commmission*, 234 Kan. 1052, 676 P.2d 764 (1984), noted that the Applicant had raised the constitutional issues as to taking and freedom of contract, but expressly refrained from deciding the constitutional issues presented. As the Court wrote ". . . we do not deem it necessary to consider the other points raised by KCPL on the appeal," *id.* at 1058, 676 P.2d at 768, and proceeded to set aside and void as unlawful the cogeneration orders as in conflict with federal statute and regulations. The Kansas Supreme Court thus was sticking to the traditional path of refraining from deciding a case on constitutional grounds when other non-constitutional grounds are available. The constitutional challenges here made thus have not previously been decided by the Kansas Supreme Court in any cogeneration case.

Nor have the constitutional challenges here presented been decided by the United States Supreme Court. The Kansas Supreme Court in *Kansas City Power & Light Company, supra,* reviewed the constitutional challenges to PURPA and the FERC Regulations in the earlier United States Supreme Court decisions. Such decisions involve only challenges that PURPA and such regulations trenched on state sovereignty in violation of the Tenth Amendment or were outside the power of Congress under the commerce clause—manifestly *not* the constitutional challenges here presented.

CONCLUSION

The Applicant respectfully requests the Commission to order a rehearing and to vacate the Order upon each and all of the grounds hereinbefore stated. The Order, and the Kansas and federal statutes and regulations upon which the Order is based, are constitutionally invalid, both generally and as applied to the Applicant and the other Kansas utilities.

Respectfully submitted,

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VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

J. Robert Miller, being first duly sworn, on his oath, states:

1. I have been employed by Kansas City Power & Light Company since 1948. I first became an officer of the Company in 1971 when I was elected Vice President of Engineering, and since that time I have been elected to and served in the following positions: Vice President of Administration in 1978, Vice President-Transmission and Distribution Systems Operation Division in 1981, Senior Vice President in 1983, and Senior Vice President and Chief Operating Officer effective September 1, 1984. Over the course of my employment, I have been and continue to be very familiar with the Company's generation, transmission and distribution systems and how they are managed and operated.

2. I have read the preceding Memorandum, and the statements of fact contained therein are true to the best of my knowledge and belief.

/s/ J. Robert Miller
J. Robert Miller

Subscribed and sworn to before me, a Notary Public, this 23rd day of October, 1984.

(SEAL) /s/ Carol Goodman
Notary Public in and for said County and State

My Commission Expires: June 15, 1987

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Memorandum and Suggestions in Support of Kansas City Power & Light Company's Application for Rehearing was hand delivered to counsel for the Commission on the 23rd day of October, 1984 and a copy hereof duly mailed on such date to each of the following:

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Supreme Court, U.S.
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CLERK

No. 85-1953

In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO AFFIRM OR DISMISS

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17pp

QUESTIONS PRESENTED

Whether the Kansas Corporation Commission cogeneration orders and the statutory and regulatory authority upon which they are based:

(1) unconstitutionally deprive Appellant of "freedom to contract" in violation of the fifth and fourteenth amendments to the United States Constitution; and

(2) unconstitutionally effect a taking of Appellant's property without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution.

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No. 85-1953

In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO AFFIRM OR DISMISS

Appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Kansas on the ground that the jurisdictional questions presented by Appellant were definitively decided by the Court in *Federal Energy Regulatory Commission, et al. v. Mississippi, et al.*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) and *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983).

STATEMENT OF THE CASE

A. Introduction

This matter is an appeal by the Kansas City Power and Light Company (Appellant) from orders of the State Corporation Commission of the State of Kansas (Appellee or Commission) concerning the development of cogeneration and small power production (collectively "cogeneration") facilities. The constitutional arguments raised by Appellant in this proceeding were heard by the Supreme Court of the State of Kansas in Case No. 58,293, *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, 238 Kan. 842, 715 P.2d 19 (1986), at which time the Kansas Supreme Court found that the Commission orders attacked by Appellant did not violate the taking clause, the contract clause or the due process clause of the fifth amendment.

B. Facts

The Commission implemented federal law and regulations and state law concerning cogeneration in Docket No. 115,379-U. Following the generic cogeneration hearings held in that docket, the Commission made findings and conclusions in an order dated April 28, 1982. (Record, Case No. 82 C 98, Vol. I, p. 61). That order, *inter alia*, established a standard formula for the computation of purchase rates to be paid cogeneration facilities having a design capacity of 100 KW or less and required electric utilities to enter into contracts with cogeneration facilities having a design capacity of more than 100 KW.

In its April 28, 1982, order, the Commission determined that, in light of the existence of considerable excess capacity within the State of Kansas, utilities operating within the State could not avoid capacity costs. Based upon sub-

stantial competent evidence of record, the Commission determined that "an energy payment alone may not provide sufficient incentive to cogeneration." (April 28, 1982, Order, Record, Case No. 82 C 98, Vol. I, p. 72). Because the congressional intent behind the Public Utilities Regulatory Policies Act (PURPA) §210 (16 U.S.C. §824a-3 *et seq.* [1980] and the Federal Energy Regulatory Commission (FERC)implementing regulations (18 C.F.R. §292.101 *et seq.* [1985]) was to encourage the development of cogeneration, the Commission relied upon coexisting state law (Parallel Generation Services Act, Kan. Stat. Ann. §66-1,184 [1979]) to establish a purchase rate in excess of avoided cost. Section by Section Analysis, 45 Fed. Reg. 12220-12221 (1980). The purchase rate established by the Commission contained an "incentive payment for capacity . . . equal to 50% of the per unit [kilowatt hour] authorized rate of return on the utility's net production plant . . ." (April 28, 1982, Order, Record, Vol I, p. 72).

Appellant and one other party applied for a rehearing of the April 28, 1982, cogeneration order on various grounds. (Record, Case No. 82 C 98, Vol. I, p. 95). The Commission granted in part and denied in part the applications for rehearing in an order dated June 18, 1982. Rehearing was held on August 18, 1982. On November 5, 1982, the Commission issued an order on rehearing which in all material respects affirmed the April 28, 1982, order. (Record, Case No. 82 C 98, Vol. I, p. 21). Appellant filed an application for rehearing of the November 5, 1982, order and the application was denied by Commission order dated December 1, 1982. The Commission issued an amended order on December 9, 1982, which modified the November 5, 1982, order in respects not material to this proceeding. Thereafter, Appellant filed an application

for rehearing of the Commission's December 9, 1982, amended order. That application was deemed denied by operation of law. Kan. Stat. Ann. §66-118b (1976).

On December 30, 1982, Appellant filed its application for judicial review in both the Kansas Court of Appeals (Case No. 82-55245-A) and the District Court of Linn County, Kansas (Case No. 82 C 98). Appellant subsequently filed a motion to stay proceedings in the Kansas Court of Appeals, a motion to stay the order of the Commission dated November 5, 1982, in the District Court of Linn County, Kansas, and a motion to stay the order of the Commission dated November 5, 1982, with the Commission. On January 26, 1983, the Kansas Court of Appeals dismissed Appellant's application for judicial review. On January 17, 1983, the Commission denied Appellant's motion to stay. On February 4, 1983, the District Court of Linn County, Kansas, denied Appellant's motion to stay.

In a journal entry dated May 12, 1983, the District Court of Linn County, Kansas, held as follows:

> Due to the compelling public interest with which public utilities are clothed, it is the judgment of the court that the forementioned statutes, acts, regulations, and orders were enacted, promulgated, and issued in the public interest, are reasonably related to federal and state energy objectives, and do not violate the due process guarantees or taking protections of the United States and Kansas Constitutions.
>
> * * *
>
> It is the judgment of the Court that the Commission did possess statutory jurisdiction and authority under K.S.A. 66-1,185 to issue the cogeneration and small power production orders here complained of because

> K.S.A. 66-1,185 authorizes the Commission to implement PURPA and regulations promulgated pursuant thereto and, further, it is the judgment of the Court that such orders are lawful, reasonable and appropriate in the circumstances and should be sustained.

Record, Case No. 82 C 98, Vol. I, p. 167.

Appellant then appealed the judgment of the Linn County District Court to the Kansas Court of Appeals. The matter was subsequently removed to the Kansas Supreme Court. In *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, 234 Kan. 1052, 676 P.2d 764 (1984), the Kansas Supreme Court reversed the district court on an issue unrelated to the constitutional arguments raised in the instant appeal. The Kansas Supreme Court found that the orders of the Commission were unlawful because the rates set by the Commission order exceeded avoided cost. The rates were in violation of PURPA and the FERC regulations because PURPA preempted the ability of states to set rates above avoided cost. (234 Kan. at 1057)[1]

The Kansas Supreme Court, in *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, 238 Kan. at 844, elected to note that in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), the United States Supreme Court held that

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1. In deciding that KCC orders setting a purchase rate in excess of avoided cost were unlawful, the Kansas Supreme Court apparently relied upon *Consolidated Ed. Co. v. P.S.C.*, 98 App. Div.2d 377, 471 N.Y.S.2d 684 (1983), which has subsequently been overturned by the New York Court of Appeals. *Consolidated Ed. Co. v. P.S.C.*, 63 N.Y.2d 424, 472 N.E.2d 981, 483 N.Y.S.2d 153 (1984). The United States Supreme Court declined to review the matter. 85 L.Ed.2d 132, 105 S.Ct. 1831 (1984).

PURPA did not violate the commerce clause or the tenth amendment of the United States Constitution.

On remand, in an order dated October 15, 1984, the Commission established a purchase rate for cogenerated energy which conformed in all respects to the opinion of the Kansas Supreme Court and implemented PURPA and the federal regulations exclusively. Appellant filed an application for rehearing relating to the Commission's October 15, 1984, order, and the application was denied by Commission order dated November 1, 1984.

Appellant appealed the Commission order to the Linn County District Court. In *Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al.*, No. 84 C 67 (D. Kan. May 31, 1985), Judge Fossey of the Linn County District Court upheld the constitutionality of the Commission order. Appellant appealed the Linn County decision to the Supreme Court of the State of Kansas, raising constitutional issues. The Kansas Supreme Court, in *Kansas City Power & Light v. State Corporation Commission*, held that:

> under the facts of this case, the provisions of the Federal Public Utility Regulatory Policies Act of 1978 (PURPA, codified as amended at 16 U.S.C. §§ 824a-3, 824i [1982]), Federal Energy Regulatory Commission (FERC) regulations implementing PURPA (18 C.F.R. §§ 292.101-.602 [1985]), K.S.A. 66-1,184 and K.S.A. 66-1,185, are not in violation of the taking clause, the contracts clause or the due process clause of the Fifth Amendment to the United States Constitution.

Kansas City Power and Light Company v. The State Corporation Commission of the State of Kansas, et al., 238 Kan. 842, 842, 715 P.2d 19 (1986). The instant appeal is taken from this Kansas Supreme Court decision. 238 Kan. 842.

ARGUMENTS IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

1. Appellant's Alleged State-Federal Regulatory "Scheme" Does Not Exist.

In framing the jurisdictional question, Appellant constructs a federal-state regulatory "scheme" consisting of:

a. Kansas statutes and administrative regulations, specifically K.S.A. 66-1,184, 66-1,185; styled the Kansas Parallel Generation Services Act and Kansas Natural Gas Policy Act, respectively; and

b. Federal statutes and regulations, specifically Sections 202 and 210 of PURPA and FERC regulations implementing the congressional action.

The constitutional infirmities alleged by Appellant are directed solely at the federal legislation and regulations. The final order of the Kansas Corporation Commission, dated October 15, 1984, and now attacked by Appellant, implemented and relied solely upon PURPA and regulations promulgated pursuant thereto. Appellant acknowledges this factual sequence in its jurisdictional statement but still proposes the existence of a federal-state regulatory "scheme."

In the final order of the Commission, the state statutes are relevant only in that Kan. Stat. Ann. §66-1,185 (1979) authorized the State Corporation Commission as the implementing state agency of the congressional mandate. Kan. Stat. Ann. §66-1,184 (1979) is independent of PURPA, and its implementation could give rise to a separate cause of action, but does not in this case because it was not relied on by the Kansas Corporation Commission in the final order from which this appeal is taken.

2. Appellant's Jurisdictional Statement Raises a Federal Question Which Was Settled by This Court in Federal Energy Regulatory Commission, et al. v. Mississippi, et al., 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) and American Paper Institute v. American Electric Power Service Corp., 461 U.S. 402, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983).

In *Kansas City Power and Light v. The State Corporation Commission of the State of Kansas,* 238 Kan. 842, 715 P.2d 19 (1986), the Kansas Supreme Court noted that the subject KCC order implements Sections 202 and 210 of PURPA, 16 U.S.C. §824a-3, 824i (Supp. II 1978), amended by 16 U.S.C. §§824a-3, 824i (Supp. IV 1980), FERC regulations implementing PURPA (18 C.F.R. §§292.101-602 [1985]), Kan. Stat. Ann. §66-1,184 (1979), and Kan. Stat. Ann. §66-1,185 (1979). (238 Kan. 842 at 842-43). The only issue the Kansas Supreme Court addressed in the *Kansas City Power & Light* case was whether Sections 202 and 210 of PURPA and regulations promulgated pursuant thereto by FERC violate the fifth amendment of the Constitution of the United States. (238 Kan. 842 at 845). The Kansas Supreme Court stated that:

> The test for due process is whether the legislative means selected has a real and substantial relation to the objective sought. The regulation must be reasonable in relation to its subject and adopted in the interest of the community. *Manhattan Buildings, Inc. v. Hurley,* 231 Kan. 20, 30, 643 P.2d 87 (1982).

Kansas City Power & Light Company v. The State Corporation Commission of the State of Kansas, 238 Kan. at 845.

> The federal government may control the conduct of individuals by any regulation which upon reasonable grounds can be regarded as adapted to promote the common welfare, convenience or prosperity. In the present case, the production of electrical power is a relevant concern for Congress. The United States Supreme Court ruled that PURPA was "reasonably adapted to the end permitted by the Constitution." *FERC v. Mississippi,* 456 U.S. 742, 758, 72 L.Ed.2d 532, 102 S.Ct. 2126 (1982). As the Supreme Court has ruled that there was "ample support for Congress' conclusions," 456 U.S. at 756, it would be difficult for us to find that there was not. PURPA was designed to encourage increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers. The law has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. Therefore, the requirements of due process are satisfied.

Kansas City Power & Light Company v. State Corporation Commission of the State of Kansas, et al., 238 Kan. at 854-55.

In *FERC v. Mississippi,* FERC and the Secretary of Energy appealed a district court ruling that PURPA Titles I and III and Section 210 were unconstitutional. The Supreme Court found that PURPA did not violate the commerce clause or the tenth amendment. (456 U.S. at 753, 755-57). The tenth amendment test applied in *FERC v. Mississippi* is not relevant to the instant appeal. However, the commerce clause test applied in that case is relevant to this appeal because it is the identical test

applied by the Kansas Supreme Court to Appellant's alleged fifth and fourteenth amendment violations in the decision from which this appeal is taken.

In *FERC v. Mississippi,* this Court applied the standard established in *Hodel v. Indiana,* 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981):

> [A] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Id.,* at 323-324 [69 L Ed 2d 40, 101 S Ct 2376].

FERC v. Mississippi, 456 U.S. at 754. The Court further stated that:

> Our inquiry, then, is whether the Congressional findings have a rational basis. Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U S at 277, 69 L Ed 2d 1, 101 S Ct 2352; Hodel v. Indiana, 452 U S, at 323-324, 69 L Ed 2d 40, 101 S Ct 2376.
>
> The legislative history provides a simple answer: There is ample support for Congress' conclusions.

FERC v. Mississippi, 456 U.S. at 755-56.

The rational basis test applied by the Supreme Court in *FERC v. Mississippi* is the same rational basis test used by the Kansas Supreme Court in the *Kansas City Power & Light* case even though the former tested PURPA's constitutionality under the commerce clause while the latter tested PURPA pursuant to the fifth and fourteenth

amendments. The rational basis test was properly applied in both cases. (*FERC v. Mississippi*, 456 U.S. at 755-56; *Kansas City Power & Light Co. v. Kansas Corporation Commission*, 238 Kan. at 854). Further, while Appellant has challenged the results of the test, it has not challenged the application of the rational basis test to the alleged fifth and fourteenth amendment violations. Application of the rational basis test resulted in the holding in both cases that: "there is ample support for Congress' actions." (456 U.S. at 756; 238 Kan. at 854).

In *American Paper Institute v. American Electric Power Service Corp.*, this Court found that FERC did not exceed its authority in promulgating the federal regulations necessary to effect purchases or sales of electricity authorized by PURPA. (*American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402, 413, 103 S.Ct. 1921, 76 L.Ed.2d 22 [1983]); *Kansas City Power & Light Co. v. Kansas Corporation Commission*, 238 Kan. 842, 844, 715 P.2d 19 [1986]).

This appeal should be dismissed or the decision of the Kansas Supreme Court affirmed because the question of the constitutionality of PURPA and the federal regulations implementing PURPA has previously been settled by this Court. *Equitable Life Assurance Society of United States v. Brown*, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902). *Minneapolis, St. Paul, & Sault Ste. M. R. Co. v. Merrick Co.*, 254 U.S. 376, 41 S.Ct. 142, 65 L.Ed. 312 (1920); *Utley v. City of St. Petersburg*, 292 U.S. 106, 54 S.Ct. 593, 78 L.Ed. 1155 (1933); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933); *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

CONCLUSION

Appellant's Jurisdictional Statement raises a well-settled federal question. The only issue in this appeal is the constitutionality of a federal statute and regulations pertaining to cogeneration. This Court has already upheld the constitutionality of Sections 202 and 210 of PURPA using the same rational basis test as employed by the Kansas Supreme Court in the case from which this appeal was taken. For the foregoing reasons, this appeal should be dismissed and the state court's decision affirmed in all respects.

Respectfully submitted,

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No. 85-1953

In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS CITY POWER & LIGHT COMPANY,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPELLANT'S REPLY TO MOTION TO AFFIRM OR DISMISS

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ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPELLANT'S REPLY TO MOTION TO AFFIRM OR DISMISS

Appellant Kansas City Power & Light Company[1] hereby opposes the Motion to Affirm or Dismiss filed by Appellee The State Corporation Commission of the State of Kansas.

1. Appellant's statement pursuant to Supreme Court Rule 28.1 is set forth in its Jurisdictional Statement.

A. Both Appellee and the Court Below Expressly Relied on State Law, As Well As the Federal Legislation and Regulations, to Authorize Promulgation of the Orders Being Challenged Here.

Appellee erroneously contends that no state-federal regulatory "Scheme" exists as the constitutional infirmities alleged by Appellant are directed solely at the federal legislation and regulations. Motion to Affirm or Dismiss at 7. In making this argument, Appellee simply ignores Appellant's discussion regarding the invalidity of the two Kansas statutes. Jurisdictional Statement at i-ii, 2-4 & n.5, 8, 11-12, 14-24. Furthermore, Appellee's own motion notes that the subject October 15, 1984 Order (App. A75-A78) implements two Kansas statutes, in addition to the federal legislation and regulations:

> In *Kansas City Power and Light v. The State Corporation Commission of the State of Kansas,* 238 Kan. 842, 715 P.2d 19 (1986), the Kansas Supreme Court noted that the subject KCC order implements Sections 202 and 210 of PURPA, 16 U.S.C. §824a-3, 824i (Supp. II 1978), amended by 16 U.S.C. §§824a-3, 824i (Supp. IV 1980), FERC regulations implementing PURPA (18 C.F.R. §§292.101-.602 [1985]), *Kan. Stat. Ann. §66-1,184 (1979), and Kan. Stat. Ann. §66-1,185 (1979).* (238 Kan. 842 at 842-43).

Motion to Affirm or Dismiss at 8 (emphasis added). Appellee's Order dated November 2, 1984 confirms this reliance on state law when it makes reference to "the Commission's October 15, 1984 Order and . . . the Kansas and federal statutes and regulations upon which the Order is based." (App. A79-A80). In view of the repeated reliance on both state and federal law in the promulgation and repromulgation of the subject Orders (*see* App. A22, A37, A53, A80), the existence of a state-federal regulatory

Scheme is clear. The Orders under consideration here implement both state and federal law, and the constitutionality of both is here challenged by Appellant.

B. This Appeal Presents Substantial Federal Questions Which Have Not Been Submitted to or Ruled Upon by This Court.

Appellee would have this Court believe that all questions presented in this appeal were resolved in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983), and *FERC v. Mississippi*, 456 U.S. 742 (1982).[2] This simply is not the case. In neither of these cases was the effect of the Taking Clause either raised in the briefs or discussed in the Opinion of the Court. Accordingly, neither case settles the question whether the statutory and regulatory Scheme here at issue violates Appellant's rights under the Taking Clause. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Likewise, no argument regarding freedom of contract was raised in either of these cases. These questions have neither been submitted to nor decided by this Court.[3]

C. The Rational Basis Test Advocated by Appellee Has No Application to a Taking Clause Challenge.

Appellee's Motion erroneously suggests that a taking without just compensation or for private use is constitu-

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2. This contention was rejected in the opinion below. *Kansas City Power & Light Co. v. State Corp. Comm'n*, 238 Kan. 842, 844, 715 P.2d 19, 22 (1986) (App. A4-A5).

3. This Court recently noted probable jurisdiction of an appeal raising one of the Taking Clause issues presented in this case. *FCC v. Florida Power Corp.*, 106 S. Ct. 2273 (1986) (order noting probable jurisdiction). See discussion in Jurisdictional Statement at i-ii, 20-21.

tionally permissible so long as the taking has a real and substantial relation to the legislative objective sought. Of course, there is no precedent supporting this remarkable proposition; the rational basis test which Appellee cites has no application in a Taking Clause analysis.[4] In determining whether a law violates the Taking Clause, the question whether it serves a legitimate public purpose is not dispositive, or even relevant: "It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982). Thus, "a permanent physical occupation authorized by government is a taking *without regard to the public interests it may serve.*" *Id.* at 426 (emphasis added). Because the statutes and regulations under consideration here authorize the taking of Appellant's property[5] for private use and without providing just compensation, they violate the Taking Clause and should be struck down.

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4. Appellee makes the astounding argument that, while Appellant has challenged the results of the rational basis test, it has not challenged the application of such test to the alleged Taking Clause violation. Motion to Affirm or Dismiss at 11. This argument completely misstates the facts.

Consistently throughout this litigation Appellant has, relying upon *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), argued that once a taking is authorized for a private party or without just compensation, the Scheme authorizing such a taking is constitutionally invalid under the Taking Clause "without regard to any supposed public interest to be served." App. A151; Jurisdictional Statement at 17-21.

5. The Scheme authorizes four distinct takings of Appellant's property, of which three are permanent physical occupations. First, it requires Appellant to allow private parties to enter physically upon Appellant's real property to use its power line easements or realty. Second, it requires Appellant to allow private parties to make physical connection with Appellant's poles, wires, and electrical facilities. Third, it requires Appellant to allow private parties to make physical intrusions of electrical power into Appellant's transmission and distribution system. Finally, the Scheme requires Appellant to pay money to private persons while receiving nothing of value in return. *See* Jurisdictional Statement at 16-21.

CONCLUSION

This Court should note probable jurisdiction and set this case for plenary review.

Respectfully submitted,

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